

Message

From: Jennifer Hartman King [JHartmanKing@kingwilliamslaw.com]
Sent: 1/17/2017 5:03:33 PM
To: Welles, Laura [Welles.Laura@epa.gov]; Jackie Flores [JFlores@kingwilliamslaw.com]
CC: Fogarty, Johnpc [Fogarty.Johnpc@epa.gov]; John Hempfling (CE CEN) [John.Hempfling@wholefoods.com]
Subject: Re: EPA CAFO/SEP

Thank you. Jackie, will you please send a calendar invitation with conference line information. Please note that this call is today at 11:00 am our time. Thank you.

Sent from my iPhone

On Jan 17, 2017, at 8:48 AM, Welles, Laura <Welles.Laura@epa.gov> wrote:

2 pm EST works for us.

From: Jennifer Hartman King [mailto:JHartmanKing@kingwilliamslaw.com]
Sent: Tuesday, January 17, 2017 11:27 AM
To: Fogarty, Johnpc <Fogarty.Johnpc@epa.gov>
Cc: Welles, Laura <Welles.Laura@epa.gov>; John Hempfling (CE CEN) <John.Hempfling@wholefoods.com>
Subject: Re: EPA CAFO/SEP

Good morning. I can make that work if needed, but 2:00 pm EST would be much easier for me. Would that work?

Sent from my iPhone

On Jan 17, 2017, at 5:37 AM, Fogarty, Johnpc <Fogarty.Johnpc@epa.gov> wrote:

Great- thank you! How does 1pm eastern/10am pacific work for everyone?

From: Jennifer Hartman King [mailto:JHartmanKing@kingwilliamslaw.com]
Sent: Monday, January 16, 2017 9:04 PM
To: Welles, Laura <Welles.Laura@epa.gov>; John Hempfling (CE CEN) <John.Hempfling@wholefoods.com>
Cc: Fogarty, Johnpc <Fogarty.Johnpc@epa.gov>
Subject: RE: EPA CAFO/SEP

Hi, all. I think a call could be very helpful in tying up the final remaining loose ends. We are down to the wire now, so I will make myself available whenever it works for the group to have a call.

In the meantime, John and Laura, here is the information you requested for GPRA reporting:

Formula		Total
Ex. 4 CBI		176,678.4 lbs.
Ex. 4 CBI		11,748 lbs.
Ex. 4 CBI		31,996.8 lbs.

We separated California and Washington because stores located in those states generate state-specific (i.e., non-RCRA) hazardous/dangerous waste. These are rough numbers based on an approximate average, but I believe they should give you what you need. Please let me know if you have any questions or need anything more on this.

Jennifer Hartman King, Managing Partner
<image001.png>

520 Capitol Mall, Suite 750
Sacramento, CA 95814
916-379-7530 – Main phone
916-379-7533 – Direct dial
916-379-7535 – Fax
Email: JHartmanKing@KingWilliamsLaw.com

Website: www.KingWilliamsLaw.com
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From: Welles, Laura [<mailto:Welles.Laura@epa.gov>]
Sent: Friday, January 13, 2017 12:08 PM
To: Jennifer Hartman King <JHartmanKing@kingwilliamslaw.com>; John Hempfling (CE CEN) <John.Hempfling@wholefoods.com>
Cc: Fogarty, Johnpc <Fogarty.Johnpc@epa.gov>
Subject: RE: EPA CAFO/SEP

Jennifer and John,

Are you available for a quick call early next week (like Tuesday) just to wrap up any loose ends (draft final CAFO, audit, Appendices, etc.)? We were thinking a call might be faster than going back and forth via email.

Let us know.

Thanks,
Laura

Laura Welles
Attorney Advisor
Waste and Chemical Enforcement Division
Office of Civil Enforcement
U.S. Environmental Protection Agency
(202) 564-2754

From: Fogarty, Johnpc
Sent: Friday, January 13, 2017 9:44 AM
To: Jennifer Hartman King <JHartmanKing@kingwilliamslaw.com>; Welles, Laura <Welles.Laura@epa.gov>
Cc: John Hempfling (CE CEN) <John.Hempfling@wholefoods.com>
Subject: RE: EPA CAFO/SEP

Thanks – these edits look fine, but one clarifying question on the change to the last sentence of Paragraph 3, which was changed as follows:

“Schools or community centers to be selected for lighting replacements and training under this SEP shall be located in ~~each region~~ the regions of the United States (e.g., Northeast, Mid-Atlantic, Pacific Northwest, etc.) where Whole Foods Market Stores are located ...”

We were trying to make sure that the projects would be more or less distributed throughout the country (or, put differently, wouldn't all be concentrated in a single area). I assume that the edit above is intended to cover the situation that some small regions may not have a suitable candidate because they are smaller, or that the funds won't be sufficient to cover at least on project in each of the regions, etc. If that's the case, I can understand that. Is there still a way to accommodate the “concentration” concern (such as, can we say that they will be located in “multiple regions”)?

Thx!

From: Jennifer Hartman King [mailto:JHartmanKing@kingwilliamslaw.com]
Sent: Thursday, January 12, 2017 6:45 PM
To: Fogarty, Johnpc <Fogarty.Johnpc@epa.gov>; Welles, Laura <Welles.Laura@epa.gov>
Cc: John Hempfling (CE CEN) <John.Hempfling@wholefoods.com>; Jennifer Hartman King <JHartmanKing@kingwilliamslaw.com>
Subject: RE: EPA CAFO/SEP

Hi, all. No problem at all. I understand what is needed and will work on pulling the information together as quickly as possible. I'll do my best to get it to you by tomorrow.

In the meantime, attached for your review is the SEP Addendum and a mark-up showing our revisions. Here are a few things to note:

- <!--[if !supportLists]--><!--[endif]-->We listed the deadline for completing the SEP as 3 years (see paragraph 7), per your suggestion.
- <!--[if !supportLists]--><!--[endif]-->We extended the timeframe for submitting the SEP Completion Report from 30 to 90 days (see paragraph 8). This report will require quite a bit of information, so we think we will need this amount of time to prepare it. Hopefully, this is acceptable to you.
- <!--[if !supportLists]--><!--[endif]-->In paragraph 9, we borrowed from the language that we agreed to add to the CAFO regarding the certification approval process. This is our effort to clarify the process/timing for obtaining EPA's response to WFM's SEP Completion Report. Hopefully, this is acceptable to you, as well.

Many thanks,
Jennifer

Jennifer Hartman King, Managing Partner
<image003.png>

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From: Fogarty, Johnpc [<mailto:Fogarty.Johnpc@epa.gov>]
Sent: Thursday, January 12, 2017 2:09 PM
To: John Hempfling (CE CEN) <John.Hempfling@wholefoods.com>; Jennifer Hartman King <JHartmanKing@kingwilliamsllaw.com>; Welles, Laura <Welles.Laura@epa.gov>
Subject: RE: EPA CAFO/SEP

GPRA = Government Performance and Results Act. We have to report up the results of our actions to OMB. All we're looking for here is an estimate of how many pounds of haz waste will be properly managed under the settlement. A rough estimate is fine (avg # lbs per store in a year times the number of stores). We don't want to ourselves make a wild guess at it, as it would be better to have it come from you all. Not looking for a rocket-science estimate, just a reasoned one you're comfortable with. Thanks!

From: John Hempfling (CE CEN) [<mailto:John.Hempfling@wholefoods.com>]
Sent: Thursday, January 12, 2017 5:00 PM
To: Jennifer Hartman King <jhartmanking@kingwilliamsllaw.com>; Welles, Laura <Welles.Laura@epa.gov>; Fogarty, Johnpc <Fogarty.Johnpc@epa.gov>
Subject: EPA CAFO/SEP

Hey Jenn:

I just talked to Laura and told her that the delay on the SEP appendix was my fault, but that I'd returned it to you about 30 minutes ago and it should be good to go today or tomorrow.

Also, Laura told me that for the Government Performance and Results Act ("GPRA") reporting requirement, they need to get the average pounds of hazardous materials handled through our program per store covered by the CAFO (so pounds of material multiplied by store covered under the CAFO). I told her I had no idea what that was, but it was probably something you knew off the top of your head. (Frankly, when she first asked, I thought "GPRA" was the average I left the University of Texas with that resulted in me not attending law school at Harvard...)

Laura: As we discussed, if I screwed any of that up please feel free to jump in and correct my mistakes.

Jenn: Let me know if you need me to help round anything up.

Thanks,

John

John H. Hempfling II
Sr. Global Litigation Counsel
Whole Foods Market Central Office
550 Bowie Street
Austin, Texas 78703
(512) 542-0213 (Office)
(512) 482-7213 (Fax)

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Appointment

From: Welles, Laura [Welles.Laura@epa.gov]
Sent: 9/28/2016 5:47:29 PM
To: Welles, Laura [Welles.Laura@epa.gov]; Moncrieffe, Marcia [Moncrieffe.Marcia@epa.gov]; Crossland, Andy [Crossland.Andy@epa.gov]
CC: Saenz, Diana [Saenz.Diana@epa.gov]; Fogarty, Johnpc [Fogarty.Johnpc@epa.gov]
Subject: Whole Foods
Location: Andy's office or Call in # **Ex. 6 Personal Privacy (PP)**
Start: 10/3/2016 8:00:00 PM
End: 10/3/2016 9:00:00 PM
Show Time As: Busy

Appointment

From: Welles, Laura [Welles.Laura@epa.gov]
Sent: 9/28/2016 5:47:28 PM
To: Moncrieffe, Marcia [Moncrieffe.Marcia@epa.gov]; Crossland, Andy [Crossland.Andy@epa.gov]
CC: Saenz, Diana [Saenz.Diana@epa.gov]; Fogarty, Johnpc [Fogarty.Johnpc@epa.gov]

Subject: Whole Foods

Location: Andy's office or Call in # **Ex. 6 Personal Privacy (PP)**

Start: 10/3/2016 8:00:00 PM

End: 10/3/2016 9:00:00 PM

Show Time As: Tentative

Appointment

From: Ng, Brian [Ng.Brian@epa.gov]
Sent: 1/3/2017 5:20:38 PM
To: Ng, Brian [Ng.Brian@epa.gov]; Welles, Laura [Welles.Laura@epa.gov]; Fogarty, Johnpc [Fogarty.Johnpc@epa.gov]
CC: Senn, John [Senn.John@epa.gov]

Subject: Discussion of Whole Foods Press Materials

Location: Conf. Call-in # **Ex. 6 Personal Privacy (PP)**

Start: 1/4/2017 3:30:00 PM

End: 1/4/2017 4:00:00 PM

Show Time As: Busy

Appointment

From: Fogarty, Johnpc [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=8546B387C687410D88EEEE387DADDF56-JFOGAR02]
Sent: 1/3/2017 5:27:22 PM
To: Ng, Brian [Ng.Brian@epa.gov]

Subject: Accepted: Discussion of Whole Foods Press Materials
Location: Conf. Call-in #: **Ex. 6 Personal Privacy (PP)**

Start: 1/4/2017 3:30:00 PM
End: 1/4/2017 4:00:00 PM
Show Time As: Busy

Appointment

From: Milton, Philip [Milton.Philip@epa.gov]
Sent: 10/6/2016 7:08:31 PM
To: Milton, Philip [Milton.Philip@epa.gov]; Fogarty, Johnpc [Fogarty.Johnpc@epa.gov]; Makepeace, Caroline [Makepeace.Caroline@epa.gov]
Subject: Seeking counsel on potential application of the audit policy
Attachments: ATT20834
Location: John's Office

Start: 10/7/2016 2:30:00 PM
End: 10/7/2016 3:00:00 PM
Show Time As: Busy

Setting up a meeting at John's request.

From: Fogarty, Johnpc
Sent: Tuesday, October 04, 2016 12:48 PM
To: Milton, Philip <Milton.Philip@epa.gov>; Makepeace, Caroline <Makepeace.Caroline@epa.gov>
Subject: Re: Seeking counsel on potential application of the audit policy

Ex. 5 AC/AWP/DP

Right now it's not urgent - we can chat another time when it's more convenient.

From: Milton, Philip
Sent: Tuesday, October 4, 2016 12:07 PM
To: Fogarty, Johnpc; Makepeace, Caroline
Subject: RE: Seeking counsel on potential application of the audit policy

I'm busy Flinting, but I could be available for a call if necessary...

Ex. 5 AC/AWP/DP

When the gravity-based and multi-day
total penalty is:

EBN should be pursued if it totals:

\$30,000 or less

at least \$3,000

\$30,001 to \$49,999

at least 10% of the proposed penalty

\$50,000 or more

\$5,000 or more

Ex. 5 AC/AWP/DP

Phil

Philip L. Milton

Chemical Engineer | U.S. Environmental Protection Agency

Office of Enforcement & Compliance Assurance | Office of Civil Enforcement | Special Litigation & Projects Division | Litigation and
Audit Policy Branch

1200 Pennsylvania Avenue, NW | Mail Code: 2248A | WJC South Bldg Rm 3124-B | Washington, DC 20460

Milton.philip@epa.gov | phone: 202-564-5029 | fax: 202-564-0010

From: Fogarty, Johnpc

Sent: Tuesday, October 04, 2016 11:29 AM

To: Makepeace, Caroline <Makepeace.Caroline@epa.gov>; Milton, Philip <Milton.Philip@epa.gov>

Subject: Re: Seeking counsel on potential application of the audit policy

Ex. 5 AC/AWP/DP

I'm working at home today, but can do a call early afternoon if we need it.

From: Makepeace, Caroline

Sent: Tuesday, October 4, 2016 11:12 AM

To: Fogarty, Johnpc; Milton, Philip

Subject: RE: Seeking counsel on potential application of the audit policy

Ex. 5 AC/AWP/DP

Ex. 5 AC/AWP/DP

I know, I ask alotta questions. Bear with me. But, maybe we should all chat together, if Phil has a minute.

Caroline Makepeace
Chief, Litigation and Cross-Cutting Policy Branch, and
Acting Chief, Litigation and Audit Policy Branch
Special Litigation and Projects Division
Office of Civil Enforcement
US Environmental Protection Agency
202-564-6012

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From: Fogarty, Johnpc
Sent: Tuesday, October 04, 2016 10:57 AM
To: Makepeace, Caroline <Makepeace.Caroline@epa.gov>; Milton, Philip <Milton.Philip@epa.gov>
Subject: Re: Seeking counsel on potential application of the audit policy

Thanks for the quick response/reaction. Sorry you're on zero sleep.

Ex. 5 AC/AWP/DP

Ex. 5 AC/AWP/DP

From: Makepeace, Caroline
Sent: Tuesday, October 4, 2016 10:45 AM
To: Fogarty, Johnpc; Milton, Philip
Subject: RE: Seeking counsel on potential application of the audit policy

Ex. 5 AC/AWP/DP

Ex. 5 AC/AWP/DP

Also, warning! --pretty bad sleep last night, and insufficient java, so none of what I'm thinking may make sense....

Caroline Makepeace
Chief, Litigation and Cross-Cutting Policy Branch, and
Acting Chief, Litigation and Audit Policy Branch
Special Litigation and Projects Division
Office of Civil Enforcement
US Environmental Protection Agency
202-564-6012

This may contain enforcement confidential or privileged material. Do not release without appropriate review. If you have received this message in error, please inform the sender, and promptly delete.

From: Fogarty, Johnpc
Sent: Tuesday, October 04, 2016 10:06 AM
To: Makepeace, Caroline <Makepeace.Caroline@epa.gov>; Milton, Philip <Milton.Philip@epa.gov>
Subject: Seeking counsel on potential application of the audit policy

Have some audit policy questions for you guys (Phil, not sure if your Flint duties are taking you away from wearing your audit policy guru hat, so please ignore if that's the case). This is in connection with a company-wide settlement we're looking at doing with Whole Foods, and

Ex. 5 AC/AWP/DP

Hence the reason for this consul/guidance.

The background is that this is building off the just-concluded case in R6 with WF. The case involves handling of returned consumer products that need to be managed as hazardous waste if discarded (things like, for WF, would be returned nail polish/remover, some detergents, etc., that can't be re-stocked/re-sold).

Ex. 5 AC/AWP/DP

Ex. 5 AC/AWP/DP

Immediately after concluding the R6 case, WF approached us about a national settlement, to cover all the rest of its stores. We met with them last week, and agreed in principle to a company-wide settlement in which they would put in place an electronic management system for product take-backs, including use of hand-held scanners, to identify anything that needs to be handled as potentially hazardous if discarded.

Ex. 5 AC/AWP/DP

Ex. 5 AC/AWP/DP

Ex. 5 AC/AWP/DP

Ex. 5 AC/AWP/DP

Ex. 5 AC/AWP/DP

Ex. 5 AC/AWP/DP

Ex. 5 AC/AWP/DP

Ex. 5 AC/AWP/DP

THANKS!

Message

From: Welles, Laura [Welles.Laura@epa.gov]
Sent: 11/18/2016 6:24:57 PM
To: Fogarty, Johnpc [Fogarty.Johnpc@epa.gov]
Subject: RE: WF audit - draft #1

I'm still getting up to speed on part 22 (and administrative practice),

Ex. 5 AC/AWP/DP

Ex. 5 AC/AWP/DP

Just as an FYI, Ex. 6 Personal Privacy (PP) I've been directing any questions I have to Gabe Salinas - the R6 inspector on the case.

Also -- I'm tracking down how HQs noticed the states per RCRA section 3008(a)(2) in the Walmart case.

-----Original Message-----

From: Fogarty, Johnpc
Sent: Monday, November 14, 2016 2:06 PM
To: Welles, Laura <Welles.Laura@epa.gov>
Subject: RE: WF audit - draft #1

Ex. 5 AC/AWP/DP

-----Original Message-----

From: Welles, Laura
Sent: Monday, November 14, 2016 11:16 AM
To: Fogarty, Johnpc <Fogarty.Johnpc@epa.gov>
Subject: RE: WF audit - draft #1

Ex. 5 AC/AWP/DP

-----Original Message-----

From: Fogarty, Johnpc
Sent: Thursday, November 10, 2016 1:47 PM
To: Welles, Laura <Welles.Laura@epa.gov>
Subject: RE: WF audit - draft #1

Thx. Ex. 5 AC/AWP/DP

Ex. 5 AC/AWP/DP I think the SEP administration/oversight is going to be a bit on the high side.

-----Original Message-----

From: Welles, Laura
Sent: Thursday, November 10, 2016 1:34 PM
To: Fogarty, Johnpc <Fogarty.Johnpc@epa.gov>
Subject: RE: WF audit - draft #1

See attached -- minor suggested changes.

Ex. 5 AC/AWP/DP

-----Original Message-----

From: Fogarty, Johnpc
Sent: Friday, November 04, 2016 5:01 PM
To: Welles, Laura <Welles.Laura@epa.gov>
Subject: WF audit - draft #1

Draft CAFO language and a revised explanation/description.

Ex. 5 AC/AWP/DP

Ex. 5 AC/AWP/DP

The CAFO provisions is set up as an appendix, to make drafting that part easier (the placeholder in the main body can just refer to it). This is a first cut, but would appreciate your feedback. Thx!

Message

From: Jennifer Hartman King [JHartmanKing@KingWilliamsLaw.com]
Sent: 10/18/2016 10:43:29 PM
To: Welles, Laura [Welles.Laura@epa.gov]; John Hempfling (CE CEN) [John.Hempfling@wholefoods.com]
CC: Fogarty, Johnpc [Fogarty.Johnpc@epa.gov]; Anna Brown [ABrown@KingWilliamsLaw.com]
Subject: RE: EPA/Whole Foods Market -- follow up to 10/5 call

Hi, Laura.

Yes, that is correct. All WFM Regions have a Hazardous Waste Determination Guidance Chart. For each Region in which there are state-specific universal wastes and/or additional state regulated hazardous waste streams (e.g., California-regulated toxics), the Hazardous Waste Determination Guidance Chart includes those categories.

Please let us know if you have any other questions.

My best,
Jenn

Jennifer Hartman King, Managing Partner



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Sacramento, CA 95814
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From: Welles, Laura [mailto:Welles.Laura@epa.gov]
Sent: Tuesday, October 18, 2016 1:42 PM
To: Jennifer Hartman King <JHartmanKing@KingWilliamsLaw.com>; John Hempfling (CE CEN) <John.Hempfling@wholefoods.com>
Cc: Fogarty, Johnpc <Fogarty.Johnpc@epa.gov>; Anna Brown <ABrown@KingWilliamsLaw.com>
Subject: RE: EPA/Whole Foods Market -- follow up to 10/5 call

Jenn:

Thank you for providing the materials – I appreciate it.

Do you have HW Determination Guidance Charts for each region? I am assuming yes, but wanted to confirm with you.

Laura

Laura Welles
Attorney Advisor
Waste and Chemical Enforcement Division
Office of Civil Enforcement
U.S. Environmental Protection Agency
(202) 564-2754

From: Jennifer Hartman King [mailto:JHartmanKing@KingWilliamsLaw.com]
Sent: Monday, October 17, 2016 6:55 PM
To: Welles, Laura <Welles.Laura@epa.gov>; John Hempfling (CE CEN) <John.Hempfling@wholefoods.com>
Cc: Fogarty, Johnpc <Fogarty.Johnpc@epa.gov>; Anna Brown <ABrown@KingWilliamsLaw.com>
Subject: RE: EPA/Whole Foods Market -- follow up to 10/5 call

Hi, Laura. Thank you for your email. In response to your request for background materials regarding the **Ex. 4 CBI** **Ex. 4 CBI** and examples of Whole Foods' Hazardous Waste Program documents, Anna Brown from my office will be sending you a link that will allow you to view the following documents:

1. **Ex. 4 CBI**
2. **Ex. 4 CBI**
3. WFM's National Hazardous Waste Program SOP
4. **Ex. 4 CBI**
5. Hazardous Waste Determination Guidance Chart **Ex. 4 CBI**
Ex. 4 CBI

If you do not receive an email from Anna with the link in the next 30 minutes or so, please check your spam or clutter box. If you have any trouble viewing the materials, please let us know.

We look forward to talking with you on Wednesday. Thank you.

My best,
Jennifer

Jennifer Hartman King, Managing Partner



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ED_005188A_00000057-00002

From: Welles, Laura [<mailto:Welles.Laura@epa.gov>]
Sent: Thursday, October 13, 2016 2:36 PM
To: Jennifer Hartman King <JHartmanKing@KingWilliamsLaw.com>; John Hempfling (CE CEN) <John.Hempfling@wholefoods.com>
Cc: Fogarty, Johnpc <Fogarty.Johnpc@epa.gov>
Subject: RE: EPA/Whole Foods Market -- follow up to 10/5 call

Hi Jenn:

Ex. 6 Personal Privacy (PP) it is my understanding from your email below that it is unlikely that you will be able to gather and send the requested materials to us this week. No problem – do you have a sense of when you can get the materials to us next week?

John Fogarty and I are in the midst of drafting a CAFO to share with you. As we indicated to you last week, we had planned to get the draft CAFO to you this week, but it was assuming we would have Whole Foods Market's materials so that the hazardous waste management program and **Ex. 4 CBI** could be reflected in it. Once we get the requested materials from you, we will aim to turn the draft CAFO around as quickly as possible.

Please let me know if you have any questions or wish to discuss this further.

We look forward to speaking with you next Wednesday (10/19) at 3:00 PM EST.

Laura

Laura Welles
Attorney Advisor
Waste and Chemical Enforcement Division
Office of Civil Enforcement
U.S. Environmental Protection Agency
(202) 564-2754

From: Jennifer Hartman King [<mailto:JHartmanKing@KingWilliamsLaw.com>]
Sent: Friday, October 07, 2016 6:06 PM
To: Welles, Laura <Welles.Laura@epa.gov>; John Hempfling (CE CEN) <John.Hempfling@wholefoods.com>
Cc: Fogarty, Johnpc <Fogarty.Johnpc@epa.gov>
Subject: RE: EPA/Whole Foods Market -- follow up to 10/5 call

Hi, Laura. Thank you for your email.

I followed up with John H. regarding timing for our next call, and **Ex. 6 Personal Privacy (PP)** Could we schedule our call for the following Wednesday (October 12th)? As of now, we are available anytime that day, but please keep in mind the time difference between us when choosing a time.

We are working on gathering the materials you requested. I am not sure whether we will be able to get them to you **Ex. 6 Personal Privacy (PP)** but we will do our best.

Thank you and we look forward to talking with you soon.

Jennifer Hartman King, Managing Partner



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Sacramento, CA 95814
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916-379-7533 – Direct dial
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From: Welles, Laura [<mailto:Welles.Laura@epa.gov>]
Sent: Thursday, October 06, 2016 10:17 AM
To: John Hempfling (CE CEN) <John.Hempfling@wholefoods.com>; Jennifer Hartman King <JHartmanKing@KingWilliamsLaw.com>
Cc: Fogarty, Johnpc <Fogarty.Johnpc@epa.gov>
Subject: EPA/Whole Foods Market -- follow up to 10/5 call

John and Jenn:

It was good to touch base with you yesterday regarding Whole Foods Market (WFM). John Fogarty and I found it really helpful to get an overview of the corporate/organizational structure of WFM, as well as the **Ex. 4 CBI**

Ex. 4 CBI

As John mentioned yesterday, we will share a draft CAFO with you next week.

With regard to materials/documents we requested yesterday, it is my understanding from our discussion that you will provide us with more information **Ex. 4 CBI**

Ex. 4 CBI), as well as training and guidance materials associated with WFM's hazardous waste management program. It would also be helpful if you provided us with a list of all covered WFM affiliated stores (excluding those covered by the Region 6 CAFO), organized by each corporate entity and region (e.g., North Atlantic), and then by state (or portion of the state). This list will serve as an appendix to the CAFO.

As we left it yesterday, we will wait to hear from you regarding whether next week's call is on Thursday (10/13) or Friday (10/14) afternoon.

In the meantime, **Ex. 6 Personal Privacy (PP)**

Laura

Laura Welles
Attorney Advisor
Waste and Chemical Enforcement Division
Office of Civil Enforcement
U.S. Environmental Protection Agency
(202) 564-2754

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Message

From: Welles, Laura [Welles.Laura@epa.gov]
Sent: 10/18/2016 5:14:47 PM
To: Fogarty, Johnpc [Fogarty.Johnpc@epa.gov]
Subject: RE: Whole Foods - draft CAFO

Thanks for the background.

Ex. 5 AC/AWP/DP

Ex. 5 AC/AWP/DP

Thoughts, etc. I'll also check in with Diana and Andy so that the CAFO is consistent with other RCRA settlements.

I took a quick look at the materials WF set up on the Box cloud. I found them helpful, especially more insight to the types of consumer products and the

Ex. 4 CBI

Ex. 4 CBI

Ex. 4 CBI

With regard to the draft CAFO, I'll look at the IR and try to tailor it more to WF's program. I also want to start to discuss timelines with you for IR (e.g., by X date, submit current list of consumer products each Respondent currently manages, etc.). I still think it makes sense to have much of the IR in appendices, especially if WF is going to designate most of the materials as CBI.

Is the plan to try and get this draft CAFO to WF a few hours before the meeting tomorrow? It might be tight, but probably a big step in moving this along...

From: Fogarty, Johnpc
Sent: Tuesday, October 18, 2016 9:47 AM
To: Welles, Laura <Welles.Laura@epa.gov>
Subject: RE: Whole Foods - draft CAFO

Sure thing. There are probably some other folks in WCED who are more facile on part 22 than I am (I tend to work primarily on civil judicial), but my go-to for admin lit questions is Gary Jones). For the two items below, it's sort of a belt-and-suspenders thing. 22.8 prohibits ex parte communications once a complaint is filed. Here, since we're jumping immediately to settlement, that prohibition arguably doesn't apply, but just to remove any question or issue we typically provide that for a waiver of the prohibition.

For the PRA, that law limits what info we can require of a private party to be submitted to us, without OMB approval. There's a law enforcement exemption for that, but just remove any doubt/preclude the defendant from raising it as a defense if we're investigating noncompliance with the CAFO, we provide that the PRA is likewise waived (I put it in all my CDs).

From: Welles, Laura
Sent: Monday, October 17, 2016 6:32 PM

To: Fogarty, Johnpc <Fogarty.Johnpc@epa.gov>

Subject: RE: Whole Foods - draft CAFO

Got it – thanks. I found them helpful and they made me think of other things I overlooked or wanted to describe more, etc.

At some point I have some general questions to ask you re: some of the waivers I'm not familiar with, but see in many of EPA's CAFOs, including Walmart (e.g., 40 CFR § 22.8, paperwork reduction act).

From: Fogarty, Johnpc

Sent: Monday, October 17, 2016 6:10 PM

To: Welles, Laura <Welles.Laura@epa.gov>

Subject: Re: Whole Foods - draft CAFO

Also, just to be clear, my edits, etc are all really just suggestions - if you think they're not apt, have a different view, etc, pls feel free to push back.

Sent from my iPhone

On Oct 17, 2016, at 5:49 PM, Welles, Laura <Welles.Laura@epa.gov> wrote:

I'm in the process of incorporating your edits, etc. into the draft CAFO.

With regard to your questions/comments in the draft CAFO about all Whole Foods Markets being CESQGs, I think you're right – WF indicated to us during the first meeting that their stores = CESQGs. I want to confirm with them again. I did an ECHO search – of the WF stores listed (only about one or two dozen were listed), most were CESQS (or there was no RCRA info) except this Chicago store was SQG – <https://echo.epa.gov/detailed-facility-report?fid=110005966598>. I don't fully trust the data in ECHO, but thought it was worth following up with WF.

Laura

Laura Welles

Attorney Advisor

Waste and Chemical Enforcement Division

Office of Civil Enforcement

U.S. Environmental Protection Agency

(202) 564-2754

Message

From: Jennifer Hartman King [JHartmanKing@KingWilliamsLaw.com]
Sent: 10/17/2016 1:59:48 PM
To: Welles, Laura [Welles.Laura@epa.gov]
CC: Fogarty, Johnpc [Fogarty.Johnpc@epa.gov]; John Hempfling (CE CEN) [John.Hempfling@wholefoods.com]
Subject: Re: EPA/Whole Foods Market -- follow up to 10/5 call

My apologies. I'll correct the calendar invitation when I get back to my computer. Thank you.

Sent from my iPhone

On Oct 14, 2016, at 10:07 AM, Welles, Laura <Welles.Laura@epa.gov> wrote:

Jenn,

I just wanted to give you a heads up that the invite John Fogarty and I received appears to be scheduled for Wednesday (10/19) from 6:00 to 7:00 pm EST rather than from 3:00 to 4:00 pm EST.

Laura

Laura Welles
Attorney Advisor
Waste and Chemical Enforcement Division
Office of Civil Enforcement
U.S. Environmental Protection Agency
(202) 564-2754

From: Jennifer Hartman King [mailto:JHartmanKing@KingWilliamsLaw.com]
Sent: Tuesday, October 11, 2016 12:35 PM
To: Welles, Laura <Welles.Laura@epa.gov>; John Hempfling (CE CEN) <John.Hempfling@wholefoods.com>
Cc: Fogarty, Johnpc <Fogarty.Johnpc@epa.gov>
Subject: RE: EPA/Whole Foods Market -- follow up to 10/5 call

Excellent – thank you. That time works well for me. Hopefully, it works for John, too. I will send a calendar invitation momentarily.

Jennifer Hartman King, Managing Partner
<image001.gif>

520 Capitol Mall, Suite 750
Sacramento, CA 95814
916-379-7530 – Main phone
916-379-7533 – Direct dial
916-379-7535 – Fax
Email: JHartmanKing@KingWilliamsLaw.com

Website: www.KingWilliamsLaw.com
[Click Here for King Williams LLP News and Alerts](#)

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From: Welles, Laura [<mailto:Welles.Laura@epa.gov>]
Sent: Tuesday, October 11, 2016 8:07 AM
To: Jennifer Hartman King <JHartmanKing@KingWilliamsLaw.com>; John Hempfling (CE CEN) <John.Hempfling@wholefoods.com>
Cc: Fogarty, Johnpc <Fogarty.Johnpc@epa.gov>
Subject: RE: EPA/Whole Foods Market -- follow up to 10/5 call

Jenn:

Next Wednesday (10/19) works great. Does 3 to 4:00 PM EST work for you and John?

Laura

Laura Welles
Attorney Advisor
Waste and Chemical Enforcement Division
Office of Civil Enforcement
U.S. Environmental Protection Agency
(202) 564-2754


From: Jennifer Hartman King [<mailto:JHartmanKing@KingWilliamsLaw.com>]
Sent: Friday, October 07, 2016 6:06 PM
To: Welles, Laura <Welles.Laura@epa.gov>; John Hempfling (CE CEN) <John.Hempfling@wholefoods.com>
Cc: Fogarty, Johnpc <Fogarty.Johnpc@epa.gov>
Subject: RE: EPA/Whole Foods Market -- follow up to 10/5 call

Hi, Laura. Thank you for your email.

I followed up with John H. regarding timing for our next call, **Ex. 6 Personal Privacy (PP)**
Ex. 6 Personal Privacy (PP) Could we schedule our call for the following Wednesday (October 12th)? As of now, we are available anytime that day, but please keep in mind the time difference between us when choosing a time.

We are working on gathering the materials you requested. I am not sure whether we will be able to get them to you **Ex. 6 Personal Privacy (PP)** but we will do our best.

Thank you and we look forward to talking with you soon.

Jennifer Hartman King, Managing Partner
<

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Website: www.KingWilliamsLaw.com

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From: Welles, Laura [<mailto:Welles.Laura@epa.gov>]
Sent: Thursday, October 06, 2016 10:17 AM
To: John Hempfling (CE CEN) <John.Hempfling@wholefoods.com>; Jennifer Hartman King <JHartmanKing@KingWilliamsLaw.com>
Cc: Fogarty, Johnpc <Fogarty.Johnpc@epa.gov>
Subject: EPA/Whole Foods Market -- follow up to 10/5 call

John and Jenn:

It was good to touch base with you yesterday regarding Whole Foods Market (WFM). John Fogarty and I found it really helpful to get an overview of the corporate/organizational structure of WFM, as well as

Ex. 4 CBI

As John mentioned yesterday, we will share a draft CAFO with you next week.

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Message

From: John Hempfling (CE CEN) [John.Hempfling@wholefoods.com]
Sent: 10/15/2016 7:03:39 PM
To: Welles, Laura [Welles.Laura@epa.gov]; Jennifer Hartman King [jhartmanking@kingwilliamsllaw.com]
CC: Fogarty, Johnpc [Fogarty.Johnpc@epa.gov]
Subject: RE: EPA/Whole Foods Market -- follow up to 10/5 call

I can do 3:00-4:00 pm EST on Wednesday assuming that still works for Jenn.

John H. Hempfling II
Sr. Global Litigation Counsel
Whole Foods Market Central Office
550 Bowie Street
Austin, Texas 78703
(512) 542-0213 (Office)
(512) 482-7213 (Fax)

This transmission may be: (1) subject to the Attorney-Client Privilege, (2) an attorney work product, (3) strictly confidential, or read and/or processed by another individual on my behalf. If you are not the intended recipient of this message, you may not disclose, print, copy or disseminate this information. If you have received this in error, please reply and notify the sender (only) and delete the message. Unauthorized interception of this e-mail is a violation of federal criminal law.

IRS Circular 230 Notice: Any federal tax advice contained in this email and any attached documents is not intended or written to be and cannot be used or referred to for the purpose of (i) avoiding penalties that may be imposed by the Internal Revenue Service or (ii) promoting, marketing or recommending any partnership or other entity, transaction, investment plan, or other arrangement.

From: Welles, Laura [mailto:Welles.Laura@epa.gov]
Sent: Friday, October 14, 2016 12:08 PM
To: Jennifer Hartman King <jhartmanking@kingwilliamsllaw.com>
Cc: Fogarty, Johnpc <Fogarty.Johnpc@epa.gov>; John Hempfling (CE CEN) <John.Hempfling@wholefoods.com>
Subject: RE: EPA/Whole Foods Market -- follow up to 10/5 call

Jenn,

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Laura Welles
Attorney Advisor
Waste and Chemical Enforcement Division
Office of Civil Enforcement
U.S. Environmental Protection Agency
(202) 564-2754

From: Jennifer Hartman King [mailto:JHartmanKing@KingWilliamsLaw.com]
Sent: Tuesday, October 11, 2016 12:35 PM
To: Welles, Laura <Welles.Laura@epa.gov>; John Hempfling (CE CEN) <John.Hempfling@wholefoods.com>
Cc: Fogarty, Johnpc <Fogarty.Johnpc@epa.gov>
Subject: RE: EPA/Whole Foods Market -- follow up to 10/5 call

Excellent – thank you. That time works well for me. Hopefully, it works for John, too. I will send a calendar invitation momentarily.

Jennifer Hartman King, Managing Partner



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From: Welles, Laura [<mailto:Welles.Laura@epa.gov>]
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To: Jennifer Hartman King <JHartmanKing@KingWilliamsLaw.com>; John Hempfling (CE CEN) <John.Hempfling@wholefoods.com>
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Subject: RE: EPA/Whole Foods Market -- follow up to 10/5 call

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Laura Welles
Attorney Advisor
Waste and Chemical Enforcement Division
Office of Civil Enforcement
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Sent: Friday, October 07, 2016 6:06 PM
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Thank you and we look forward to talking with you soon.

Jennifer Hartman King, Managing Partner



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From: Welles, Laura [<mailto:Welles.Laura@epa.gov>]
Sent: Thursday, October 06, 2016 10:17 AM
To: John Hempfling (CE CEN) <John.Hempfling@wholefoods.com>; Jennifer Hartman King <JHartmanKing@KingWilliamsLaw.com>
Cc: Fogarty, Johnpc <Fogarty.Johnpc@epa.gov>
Subject: EPA/Whole Foods Market -- follow up to 10/5 call

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Ex. 4 CBI

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Ex. 4 CBI as well as training and guidance materials associated with WFM's hazardous waste management program. It would also be helpful if you provided us with a list of all covered WFM affiliated stores (excluding those covered by the Region 6 CAFO), organized by each corporate entity and region (e.g., North Atlantic), and then by state (or portion of the state). This list will serve as an appendix to the CAFO.

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Ex. 6 Personal Privacy (PP)

Laura

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Message

From: Welles, Laura [Welles.Laura@epa.gov]
Sent: 11/11/2016 12:46:36 AM
To: Jennifer Hartman King [JHartmanKing@kingwilliamslaw.com]; John Hempfling (CE CEN) [John.Hempfling@wholefoods.com]
CC: Fogarty, Johnpc [Fogarty.Johnpc@epa.gov]
Subject: RE: [CONFIDENTIAL SETTLEMENT COMMUNICATION] Draft CAFO with EPA's revisions
Attachments: Draft EPA CAFO with WFM revisions (00013553xD64DF) (002)_EPA edits 11-10-2016.docx; September 27 2016 memo Suzuki Motor.pdf

Hi John and Jenn,

It was good to touch base with you earlier today regarding the draft CAFO. Attached is the CAFO with EPA's revisions. As you'll find, the revisions reflect our discussion today re: universal waste, etc. I've also attached the EAB memo that John and I referenced today during the call.

As I mentioned to you on the phone, language regarding waivers, jurisdiction, statutory/regulatory background, alleged facts (see paragraphs 23-25), and effect of settlement/reservation of rights was put back into the document to meet the requirements of 40 CFR Part 22, specifically 22.13(b), 22.18(b) & (c), portions of 22.14(a), and 22.31(a). There were also changes made to some of your proposed language in the compliance provisions section. As we discussed today, our hope is to strike a balance between describing your program in the CAFO (holding it out as a model for other grocery stores) and respecting the details/specifics of the trainings, SOPs, tote system, etc. by placing in Appendices marked as CBI.

With regard to the appendices, it would be great if you could send us Appendix A in the next week or so. We want to have a better sense of the number of stores. If you recall, we'd like the list of stores to be organized by each corporate entity and region (e.g., North Atlantic), and then by state (or portion of the state).

Please let me or John know if you have any questions regarding the attached draft CAFO and EPA's revisions.

We look forward to seeing you in person in the coming weeks.

Laura

Laura Welles
Attorney Advisor
Waste and Chemical Enforcement Division
Office of Civil Enforcement
U.S. Environmental Protection Agency
(202) 564-2754

From: Jennifer Hartman King [mailto:JHartmanKing@kingwilliamslaw.com]
Sent: Wednesday, November 02, 2016 2:14 PM
To: Fogarty, Johnpc <Fogarty.Johnpc@epa.gov>; Welles, Laura <Welles.Laura@epa.gov>
Cc: John Hempfling (CE CEN) <John.Hempfling@wholefoods.com>; Aminah Famili <AFamili@kingwilliamslaw.com>
Subject: [CONFIDENTIAL SETTLEMENT COMMUNICATION] Draft CAFO

Dear John and Laura,

Thank you for taking the time to talk with us yesterday. As promised, attached is our proposed draft of the CAFO. We look forward to coordinating further with you on this.

My best,
Jennifer

Jennifer Hartman King, Managing Partner



520 Capitol Mall, Suite 750
Sacramento, CA 95814
916-379-7530 – Main phone
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Message

From: Welles, Laura [Welles.Laura@epa.gov]
Sent: 11/10/2016 7:07:46 PM
To: Fogarty, Johnpc [Fogarty.Johnpc@epa.gov]
Subject: RE: WF audit - draft #1
Attachments: Proposed Final Order 11_10_16.docx

Sounds good. Attached is the proposed final order -- I just used the boiler plate language from the template on the EAB website...

The certificate of service will need to be adjusted accordingly.

-----Original Message-----

From: Fogarty, Johnpc
Sent: Thursday, November 10, 2016 1:47 PM
To: Welles, Laura <Welles.Laura@epa.gov>
Subject: RE: WF audit - draft #1

Thx. **Ex. 5 AC/AWP/DP**
Ex. 5 AC/AWP/DP I think the SEP administration/oversight is going to be a bit on the high side.

-----Original Message-----

From: Welles, Laura
Sent: Thursday, November 10, 2016 1:34 PM
To: Fogarty, Johnpc <Fogarty.Johnpc@epa.gov>
Subject: RE: WF audit - draft #1

See attached -- minor suggested changes.

Ex. 5 AC/AWP/DP

-----Original Message-----

From: Fogarty, Johnpc
Sent: Friday, November 04, 2016 5:01 PM
To: Welles, Laura <Welles.Laura@epa.gov>
Subject: WF audit - draft #1

Draft CAFO language and a revised explanation/description. **Ex. 5 AC/AWP/DP**
Ex. 5 AC/AWP/DP The CAFO provisions is set up as an appendix, to make drafting that part easier (the placeholder in the main body can just refer to it). This is a first cut, but would appreciate your feedback. Thx!

**BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.**

In re:)	
)	
)	
Whole Foods Market Group, Inc.,	)	Docket No. RCRA-HQ-2016-_____
Whole Foods Market California, Inc.)	
Mrs. Gooch's Natural Food Markets, Inc.,)	
Whole Foods Market Pacific Northwest, Inc.,)	
and Whole Foods Market Rocky Mountain/)	
Southwest, L.P.,)	
)	

FINAL ORDER

Pursuant to 40 C.F.R. § 22.18(b)-(c) of EPA's Consolidated Rules of Practice, the attached Consent Agreement resolving this matter is incorporated by reference into this Final Order and is hereby ratified.

The Respondents are ORDERED to comply with the terms of the Consent Agreement, effective immediately.

So ordered.¹

Dated: _____

Judge, Environmental Appeals Board

¹ The three-member panel ratifying this matter is composed of Environmental Appeals Judges _____.

CERTIFICATE OF SERVICE

I certify that copies of the foregoing "Consent Agreement" and "Final Order" in the matter of Whole Foods Market Group, Inc., et al., Docket No. RCRA-HQ-2016-____, were filed and copies of the same were sent to the following person in the manner indicated below:

Via Interoffice Mail:

Laura K. Welles, Esq.
Waste and Chemical Enforcement Division
Office of Civil Enforcement
1200 Pennsylvania Ave., NW (Mail Code 2249A)
Washington, DC 20460

Via U.S. Certified Mail:

John H. Hempfling II, Esq.
Whole Foods Market Central Office
550 Bowie Street
Austin, TX 78703

Message

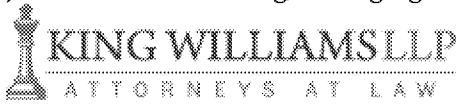
From: Jennifer Hartman King [JHartmanKing@kingwilliamsllp.com]
Sent: 11/2/2016 6:14:08 PM
To: Fogarty, Johnpc [Fogarty.Johnpc@epa.gov]; Welles, Laura [Welles.Laura@epa.gov]
CC: John Hempfling (CE CEN) [John.Hempfling@wholefoods.com]; Aminah Famili [AFamili@kingwilliamsllp.com]
Subject: [CONFIDENTIAL SETTLEMENT COMMUNICATION] Draft CAFO
Attachments: 2016-11-2 Draft EPA CAFO with WFM revisions (00013553xD64DF).docx

Dear John and Laura,

Thank you for taking the time to talk with us yesterday. As promised, attached is our proposed draft of the CAFO. We look forward to coordinating further with you on this.

My best,
Jennifer

Jennifer Hartman King, Managing Partner



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Sacramento, CA 95814
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**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY**

IN THE MATTER OF:)	EPA Docket No.
	)	RCRA-HQ-2016-_____
)	
)	
Whole Foods Market Group, Inc.,	)	Proceeding Under Section 3008(a) of the
Whole Foods Market California, Inc.,	)	Resource Conservation and Recovery Act,
Mrs. Gooch's Natural Food Markets, Inc.,	)	42 U.S.C. § 6928(a)
Whole Foods Market Pacific Northwest, Inc.,)	
and Whole Foods Market Rocky Mountain/)	
Southwest, L.P.,)	
)	
RESPONDENTS.)	

CONSENT AGREEMENT AND FINAL ORDER

I. PRELIMINARY STATEMENT

1. Complainant, the United States Environmental Protection Agency ("EPA"), and Respondents, Whole Foods Market Group, Inc., a Delaware corporation, Whole Foods Market California, Inc., a California corporation, Mrs. Gooch's Food Markets, Inc., a California corporation, Whole Foods Market Pacific Northwest, Inc., a Delaware Corporation, and Whole Foods Market Rocky Mountain/Southwest, L.P., a Texas limited partnership (collectively the "Respondents" or "Whole Foods Market"), hereby enter into this Consent Agreement and Final Order ("CAFO") before taking testimony and without adjudication of any issues of fact or law herein.

2. Complainant and Respondents, having conferred and expressing a mutual desire to enter into a global agreement covering the Whole Foods Market stores identified in Appendix A of this CAFO, which is attached hereto and incorporated by reference herein, have agreed to the execution of this CAFO. Respondents hereby agree to comply with the terms of this CAFO.

3. For the purpose of these proceedings, Respondents admit the jurisdictional allegations herein; however, Respondents neither admit nor deny the factual and legal allegations contained in this CAFO.

II. JURISDICTION

4. The parties agree to the commencement and conclusion of this matter through the issuance of this CAFO, which is authorized pursuant to Section 3008(a) of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976 and the Hazardous and Solid Waste Amendments (“HSWA”) of 1984 (collectively, “RCRA”), 42 U.S.C. § 6928(a) and 40 C.F.R. §§ 22.13(b) and 22.18(b)(2) and (3).

5. Pursuant to RCRA Section 3006(b), 42 U.S.C. § 6926(b), and Section 3008(a) and (g), 42 U.S.C. § 6928(a) and (g), EPA may enforce federally approved state hazardous waste programs, as well as the federal regulations promulgated pursuant to HSWA.¹

6. Pursuant to RCRA Section 3008(a)(2), 42 U.S.C. § 6928(a)(2), notice of the commencement of this action has been given to all Affected States and Territories.

7. Respondents waive any right to appeal the proposed Final Order set forth herein. Respondents do not waive any claims or defenses Respondents have to the interpretation of the CAFO or its terms.

III. DEFINITIONS

8. Unless otherwise expressly provided herein, terms used in the CAFO that are defined in RCRA, 42 U.S.C. §§ 6901 *et seq.*, or in regulations promulgated under RCRA, 40 C.F.R. Parts 260-279, or in a state’s authorized hazardous waste program, shall have the same meaning in this CAFO as such term has under RCRA or under federal or applicable authorized state

¹ Each of the Affected States and Territories described herein, with the exception of Iowa, have received authorization to administer their own hazardous waste program.

10/18/2016 DRAFT CAFO sent to Whole Foods Market with WFM Revisions

regulations. In the case of a conflict between federal and state definitions, federal definitions shall control. Whenever terms defined below are used in this CAFO, such definitions shall apply:

- a. “Affected State and Territory” means a state or territory of the United States in which a Whole Foods Market Store is located as identified in Appendix A of this CAFO. Oklahoma, Texas, Louisiana, New Mexico, and Arkansas are not Affected States for purposes of this CAFO.
- b. “Business Day” means any day other than Saturday, Sunday, or a federal or legal holiday.
- c. “Conditionally Exempt Small Quantity Generator” means a facility that generates 100 kg of hazardous waste or less in a calendar month.
- d. “Confidential Business Information” or “CBI” shall have the same definition as in 40 C.F.R. §§ 2.201-2.406.
- e. “Consent Agreement and Final Order” or “CAFO” shall mean this Consent Agreement and attached Final Order and all Appendices hereto. In the event of conflict between this Consent Agreement and any Appendix, this Consent Agreement shall control.
- f. “Consumer Products” shall mean any merchandise sold by Respondents at Whole Foods Market Stores, which if discarded, may have to be managed as RCRA hazardous waste.
- g. “Day” means a calendar day unless expressly stated to be a business day. In computing any period of time under this CAFO, where the last day would fall on a Saturday, Sunday, or federal, legal or Affected State or Territory holiday, the period shall run until the close of business of the next business day.
- h. “Effective Date” is defined in Section XVIII of this CAFO.

- i. “EPA” means the United States Environmental Protection Agency.
- j. “Large Quantity Generator” means a facility that generates 1000 kg or more of hazardous waste in a calendar month.
- k. “Notify” and “Submit” and other terms signifying an obligation to transmit or communicate documents and information mean to deliver in person, send via electronic mail, deposit in the U.S. mail or dispatch by express courier so that such transmission or communication arrives to the designated recipient by close of business on the day required by this CAFO. If that required day is not a Business Day then the delivery, deposit, or dispatch shall be made by the close of business the next Business Day.
- l. “Paragraph” shall mean a portion of this CAFO identified by an arabic numeral and, in some cases, an associated lower case letter.
- m. “Parties” shall mean Complainant and all Respondents.
- n. “RCRA” means the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 *et seq.*
- o. “Retail Associate” means a Whole Foods Market Store employee, including store leadership and team members.
- p. “Section” shall mean a portion of this CAFO identified by a roman numeral.
- q. “Small Quantity Generator” means a facility who generates more than 100 kg and less than 1000 kg of hazardous waste in a calendar month.
- r. “Solid Waste” means any discarded material that is not excluded under 40 C.F.R. § 261.4(a) or that is not excluded by variance granted under §§ 260.30 and 260.31.
- s. “Stores,” “Facilities,” or “Whole Foods Market Stores” mean Whole Foods Market retail grocery stores, or any future Whole Foods Market retail grocery store (including

“365 by Whole Foods Market” stores), located in the United States (including Puerto Rico and other U.S. territories).

- t. “United States” means the United States of America, and all of its departments, agencies, and instrumentalities.

IV. FACTUAL AND LEGAL ALLEGATIONS

9. Each Respondent is a “person” as defined in Section 1004(15) of RCRA, 42 U.S.C. § 6903(15) and 40 C.F.R. § 260.10.

10. Respondents own and operate the Stores identified in Appendix A of this CAFO. The stores identified in Appendix A are “facilities” within the meaning of 40 C.F.R. § 260.10.

11. Respondents sell Consumer Products, some of which may become “solid waste” when they are returned, expired, spill or are in a condition such that they cannot be used for their intended purpose.

12. Some of the Consumer Products that become solid waste may be considered hazardous waste under federal or state law by having the characteristic of ignitability (D001), corrosivity (D002), or toxicity (D007, D010, D009, and D011).

13. Most, if not all, Whole Foods Market Stores generate 100 kilograms (“kg”) of hazardous waste or less in any given month, and therefore, are considered Conditionally Exempt Small Quantity Generators (“CESQGs”) pursuant to 40 C.F.R. § 261.5. As CESQGs, the Stores are exempt from regulation under the hazardous waste generator requirements at 40 C.F.R. Part 262 and the notification requirements of RCRA Section 3010 in any given month, provided that the requirements in 40 C.F.R. § 261.5 are met.

14. Between August 2014 and August 2015, EPA Region 6 conducted an investigation of Respondent Whole Foods Market Rocky Mountain/Southwest, L.P.’s Stores located in Texas,

10/18/2016 DRAFT CAFO sent to Whole Foods Market with WFM Revisions

Oklahoma, New Mexico and Arkansas. As a result of the investigation, EPA Region 6 and Respondent Whole Foods Market Rocky Mountain/Southwest, L.P. entered into consent agreements and final orders for the Stores located within EPA Region 6's jurisdiction (the "Region 6 CAFOs").

15. Although EPA has not conducted its own investigation of Stores located outside Texas, Oklahoma, New Mexico and Arkansas, Respondents and EPA have mutually agreed to enter into a similar agreement for stores located in all states and territories other than those covered by the Region 6 CAFOs. EPA and Respondents have engaged in expedited discussions to reach the agreement contained herein, which includes implementation of an enhanced hazardous waste management system in all of Respondents' Stores. This enhanced hazardous waste management system is designed to ensure the proper management of hazardous wastes at all Whole Foods Market Stores, and in many respects goes beyond the minimum requirements necessary for compliance with the applicable federal and state hazardous waste laws and regulations. This program is more fully described in Paragraphs ____ of this CAFO and appendices ____.

16. Respondents have already taken steps to implement their enhanced hazardous waste management program, prior to the Effective Date of this CAFO.

Hazardous Waste Determinations

17. Pursuant to 40 C.F.R. § 262.11, a person who generates a solid waste is required to determine if that waste is hazardous.

18. Based upon the terms of the Region 6 CAFO, and without independent investigation, or any admission of liability or guilt by Respondents, EPA has concluded that Respondents did not systematically make hazardous waste determinations at all Whole Foods Market Stores as required by 40 C.F.R. § 262.11.

19. EPA did not identify any spills, leaks or releases at or from Respondents' facilities.

V. TERMS OF SETTLEMENT

20. Based on the foregoing, the Parties agree to the entry of this CAFO on the terms set forth herein.

Compliance Provisions

21. Although a majority of Whole Foods Market Stores may qualify as CESQGs in any given month, pursuant to 40 C.F.R. § 261.5, the enhanced hazardous waste management program implemented by Respondents at Whole Foods Market Stores, as referenced in Paragraphs ____ through ____ of this CAFO, generally seeks to satisfy the hazardous waste generator requirements applicable to Small Quantity Generators ("SQGs") and, therefore, goes above and beyond the minimum requirements applicable under the law.

22. Respondents agree to implement the following measures as part of their enhanced hazardous waste management program:

- a. If applicable, Respondents shall obtain an EPA identification number for a Whole Foods Market Store pursuant to 40 C.F.R. § 262.12.
- b. Respondents must make a hazardous waste determination on all solid waste generated in its Stores pursuant to 40 C.F.R. § 262.11. As a means of complying with this requirement, Respondents have implemented, and will continue to implement Regional and/or State-specific hazardous waste determination guidance charts.
- c. Respondents will hire a third-party consultant to review the Consumer Products at its Stores, and determine whether those Consumer Products, if discarded, would become hazardous waste pursuant to federal and state law and regulations. The

third-party consultant, after identifying the potentially hazardous items, will load the information into Respondents' electronic hazardous waste identification system for use at Whole Foods Market Stores in identifying and classifying all solid waste streams.

- d. To the extent Consumer Products become hazardous waste, Respondents have implemented, and will continue to implement a system to properly accumulate and store hazardous waste on-site (commonly referred to as the "bucket" or "tote" system) until it is picked up by a licensed hazardous waste hauler for proper off-site transport and disposal.
- e. In order to assist its Stores in implementing this enhanced hazardous waste management program, Respondents will develop and implement standard operating procedures ("SOPs") for use by Retail Associates.
- f. Third Party Audit [To Be Discussed]

23. Respondents shall certify that they are complying with the requirements set forth in Paragraphs ____ above, within _____. The certification and supporting documentation should be provided to:

Greg Sullivan, Acting Division Director
Waste and Chemical Enforcement Division
Office of Civil Enforcement
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., N.W. (2249A)
Washington, DC 20460

24. Nothing in this CAFO will require Respondents to meet more stringent requirements contained in this CAFO in the event that the applicable law becomes less stringent. Within sixty (60) days of Whole Foods Market providing written notice to EPA that applicable

10/18/2016 DRAFT CAFO sent to Whole Foods Market with WFM Revisions

requirements have been modified by issuance of any new EPA final regulation (as promulgated in the Federal Register); policy or guidance governing hazardous waste management; upon EPA approval or promulgation of new or revised waste management standards; or upon the issuance of a permit that contains new requirements pertaining to Whole Foods Market's operations, Whole Foods Market may conform its practices to the less stringent obligations contained in the applicable new regulation, policy, new or revised standard or permit.

Civil Penalty

25. Respondents agree to pay a civil penalty in the sum of \$_____ within thirty (30) days of the effective date of this CAFO. Respondents must pay the assessed civil penalty by either cashier's check, certified check, or wire transfer, made payable to: **Treasurer, United States of America**. Payment must be remitted in one of three (3) ways: regular U.S. Postal mail (including certified mail), overnight mail, or wire transfer. For regular U.S. Postal mail, U.S. Postal Service certified mail, or U.S. Postal Service express mail, the check should be remitted to:

United States Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, Missouri 63197-9000

For overnight mail (non-U.S. Postal Service, e.g. Fed Ex), the check should be remitted to:

U.S. Bank
Government Lockbox 979077
U.S. EPA Fines and Penalties
1005 Convention Plaza
SL-MO-C2-GL
St. Louis, Missouri 63101
Phone No. (314) 425-1818

For wire transfer, the payment should be remitted to:

Federal Reserve Bank of New York

10/18/2016 DRAFT CAFO sent to Whole Foods Market with WFM Revisions

ABA Routing Number: 021030004

Account Number: 68010727

SWIFT address: FRNYUS33

33 Liberty Street

New York, NY 10045

Field Tag 4200 of the Fedwire message should read: "D 68010727 Environmental Protection Agency"

The case name and document number (In the Matter of Whole Foods Market Group, Inc., et. al., Docket No. RCRA-HQ-2016-____) must be clearly documented on or within Respondents' chosen method of payment to ensure proper credit.

26. Respondents shall submit a copy of the payment to the following addresses:

U.S. Environmental Protection Agency
Clerk of the Board
Environmental Appeals Board
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460-0001

Laura Welles, Attorney-Advisor
Waste and Chemical Enforcement Division
Office of Civil Enforcement
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W. (MC 2249A)
Washington, D.C. 20460

27. Penalties paid pursuant to this CAFO are not deductible for federal purposes under 26 U.S.C. § 162(f).

28. Pursuant to 31 U.S.C. § 3717 and 40 C.F.R. § 13.11, unless otherwise prohibited by law, EPA will assess interest and late payment penalties on debts owed to the United States and a charge to cover the costs of processing and handling the delinquent claim. Interest on the civil penalty assessed in this CAFO will begin to accrue thirty (30) days after the effective date of the CAFO and will be recovered by EPA on any amount of the civil penalty that is not paid by the

respective due date. In accordance with 31 U.S.C. § 3717 and 40 C.F.R. § 13.11, Respondents must pay the following amounts on any amount overdue:

- a. Interest. Any unpaid portion of a civil penalty must bear interest at the rate established by the Secretary of the Treasury pursuant to 31 U.S.C. § 3717(a)(1). Interest will therefore begin to accrue on a civil penalty or stipulated penalty if it is not paid by the last date required. Interest will be assessed at the rate of the United States Treasury tax and loan rate in accordance with 40 C.F.R. § 13.11(a).
- b. Monthly Handling Charge. Respondents must pay a late payment handling charge of fifteen (\$15.00) on any late payment, with an additional charge of \$15.00 for each subsequent thirty (30) day period over which an unpaid balance remains.
- c. Non-payment Penalty. On any portion of a civil penalty more than ninety (90) days past due, Respondents must pay a non-payment penalty charge of six percent (6%) per annum, which will accrue from the date the penalty payment became due and is not paid. 40 C.F.R. § 13.11(c). This non-payment penalty charge is in addition to charges which accrue or may accrue under subparagraphs (a) and (b).

Supplemental Environmental Project

29. [Terms TBD]

VI. OTHER MATTERS

Effect of Settlement/Reservation of Rights

30. The terms of this CAFO constitute a full and final settlement between the Parties for all claims that have been brought or could have been brought against Respondents related to the subject matter of this CAFO, and shall bar any further actions against Respondents for acts

10/18/2016 DRAFT CAFO sent to Whole Foods Market with WFM Revisions

related to the subject matter of this CAFO which allegedly occurred prior to the date of entry of this CAFO.

31. Nothing in this CAFO shall relieve Respondents of the duty to comply with all applicable provisions of RCRA and any other federal, state, or local laws and regulations.

32. Notwithstanding any other provision of this CAFO, nothing in this CAFO shall be construed to limit the authority of the EPA to take any action against Respondent to address conditions that may present an imminent and substantial endangerment to human health or the environment.

33. Unless specifically allowed under the terms of this CAFO, this CAFO may be amended or modified only by written agreement executed by both the EPA and each Respondent.

Costs

34. The Parties to this CAFO shall bear their own costs and attorneys' fees in this matter.

35. [terms of agreement not to sue/take action - TBD]

Notification

36. Unless otherwise specified herein, whenever notice is required to be given, whenever a report or other document is required to be forwarded by one party to another, or whenever a submission or demonstration is required to be made, it must be directed to the individuals specified below at the addresses given, unless these individuals or their successors give notice in writing to the other parties that another individual has been designated to receive the communication:

Complainant:

Chief, Waste Enforcement Branch
Waste and Chemical Enforcement Division
Office of Civil Enforcement
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W. (MC 2249A)
Washington, D.C. 20460

Respondents:

Whole Foods Market Central Office
Attn: John H. Hempfling II
550 Bowie Street
Austin, TX 78703

Termination and Satisfaction

37. At such time as the Respondents believe it has completed all of the requirements of this CAFO, Respondents shall so certify in writing and in accordance with the certification language set forth in Paragraph _____. Unless EPA objects in writing within sixty (60) days of receipt of Respondents' certification, then this CAFO shall terminate on the basis of Respondents' certification.

Effective Date

38. This CAFO is effective upon the filing of the Final Order. 40 C.F.R. § 22.31(b).

AGREED AND CONSENTED TO:

FOR COMPLAINANT:

Date: _____

Greg Sullivan, Acting Director
Waste and Chemical Enforcement Division
Office of Civil Enforcement
Office of Enforcement and Compliance Assurance
United States Environmental Protection Agency

Date: _____

(Counsel for Complainant)
Waste and Chemical Enforcement Division
Office of Civil Enforcement
Office of Enforcement and Compliance Assurance
United States Environmental Protection Agency

FOR RESPONDENT WHOLE FOODS MARKET GROUP, INC.:

Date: _____

FOR RESPONDENT WHOLE FOODS MARKET CALIFORNIA, INC.:

Date: _____

FOR RESPONDENT MRS. GOOCH'S FOOD MARKETS, INC.:

Date: _____

FOR RESPONDENT WHOLE FOODS MARKET PACIFIC NORTHWEST, INC.:

Date: _____

FOR RESPONDENT WHOLE FOODS MARKET ROCKY MOUNTAIN/SOUTHWEST, L.P.:

Date: _____

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Message

From: Welles, Laura [Welles.Laura@epa.gov]
Sent: 9/28/2016 1:56:20 PM
To: Fogarty, Johnpc [Fogarty.Johnpc@epa.gov]; Saenz, Diana [Saenz.Diana@epa.gov]
Subject: RE: Whole Foods Market - Penalty Calculation

I've emailed Gabe to see about EB.

From: Fogarty, Johnpc
Sent: Wednesday, September 28, 2016 9:49 AM
To: Welles, Laura <Welles.Laura@epa.gov>; Saenz, Diana <Saenz.Diana@epa.gov>
Subject: RE: Whole Foods Market - Penalty Calculation

Ex. 5 AC/AWP/DP

From: Welles, Laura
Sent: Tuesday, September 27, 2016 5:31 PM
To: Saenz, Diana <Saenz.Diana@epa.gov>; Fogarty, Johnpc <Fogarty.Johnpc@epa.gov>
Subject: FW: Whole Foods Market - Penalty Calculation

FYI – not sure whether Andy forwarded this already, but attached is R6's penalty calculation for WF.

From: Salinas, Gabriel
Sent: Tuesday, September 27, 2016 3:51 PM
To: Welles, Laura <Welles.Laura@epa.gov>; Potts, Mark <Potts.Mark@epa.gov>
Cc: Crossland, Andy <Crossland.Andy@epa.gov>; Moncrieffe, Marcia <Moncrieffe.Marcia@epa.gov>; Barra, Michael <barra.michael@epa.gov>; Stephanos, Ann <Stephanos.Ann@epa.gov>
Subject: Whole Foods Market - Penalty Calculation

Hello everyone,

I have attached the Whole Foods penalty calculation that shows how we arrived at the total for EPA Region 6. I hope the penalty chart provides the information in a concise manner for your review.

Thanks,
Gabe

From: Potts, Mark
Sent: Tuesday, September 27, 2016 10:31 AM
To: Welles, Laura <Welles.Laura@epa.gov>
Cc: Crossland, Andy <Crossland.Andy@epa.gov>; Moncrieffe, Marcia <Moncrieffe.Marcia@epa.gov>; Salinas, Gabriel <salinas.gabriel@epa.gov>; Barra, Michael <barra.michael@epa.gov>
Subject: RE: Whole Foods

Thanks. I am copying Gabe Salinas so he can send the penalty calculations.

From: Welles, Laura

Sent: Tuesday, September 27, 2016 9:37 AM

To: Barra, Michael <barra.michael@epa.gov>; Potts, Mark <Potts.Mark@epa.gov>

Cc: Crossland, Andy <Crossland.Andy@epa.gov>; Moncrieffe, Marcia <Moncrieffe.Marcia@epa.gov>

Subject: RE: Whole Foods

Mike or Mark,

Ex. 6 Personal Privacy (PP) but I'm hoping you might have a copy of the Whole Foods penalty calculation. If so, will you please email it to me? I want to get a sense of how the penalty was calculated.

Thanks,

Laura

Laura Welles

Attorney Advisor

Waste and Chemical Enforcement Division

Office of Civil Enforcement

U.S. Environmental Protection Agency

(202) 564-2754

From: Barra, Michael

Sent: Wednesday, September 21, 2016 5:22 PM

To: Crossland, Andy <Crossland.Andy@epa.gov>; Potts, Mark <Potts.Mark@epa.gov>; Moncrieffe, Marcia <Moncrieffe.Marcia@epa.gov>; Sullivan, Greg <Sullivan.Greg@epa.gov>; Saenz, Diana <Saenz.Diana@epa.gov>; Welles, Laura <Welles.Laura@epa.gov>

Subject: RE: Whole Foods

Ex. 6 Personal Privacy (PP) I think she would have a lot of valuable insights to share on this issue if you can put it off until then. I am available both Thursday and Friday if you want to go ahead this week.

Michael C. Barra

Chief

RCRA/Toxics Enforcement Branch (6RC-ER)

Office of Regional Counsel

EPA Region 6

1445 Ross Avenue

Dallas, Texas 75202

214-665-2143

barra.michael@epa.gov

-----Original Appointment-----

From: Crossland, Andy

Sent: Wednesday, September 21, 2016 3:09 PM

To: Potts, Mark; Moncrieffe, Marcia; Barra, Michael; Sullivan, Greg; Saenz, Diana; Welles, Laura

Subject: Whole Foods

When: Thursday, September 22, 2016 12:00 PM-12:30 PM (UTC-05:00) Eastern Time (US & Canada).

Where: Call in: 855-564-1700; ext: 1104796; Participant Code: 234567

All-

I'd like to get any Regional input on the lay of the land for a national Whole Foods settlement. This time looks marginal for folks' ability to attend... If we cant get a quorum, who is in Friday?

Thanks,
--Andy

Message

From: Welles, Laura [Welles.Laura@epa.gov]
Sent: 11/9/2016 10:40:16 PM
To: Fogarty, Johnpc [Fogarty.Johnpc@epa.gov]
Subject: WF -- revised draft
Attachments: WF and EPA compare draft_shows lw edits through 11_9_2016_incorp OCE edits.docx

I'm not sure you want to see this again, but I made some adjustments – I accepted my earlier edits, as well as your edits.

Ex. 5 AC/AWP/DP

All edits added later today are in track changes.

I met with Diana and Andy –

Ex. 5 AC/AWP/DP

Ex. 5 AC/AWP/DP

Ex. 5 AC/AWP/DP

The headings may be a bit different, but I've found that many CAFOs are all over the place with headings, etc.

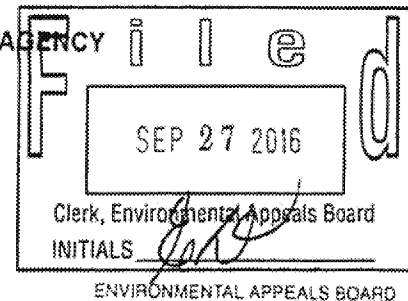
I was thinking that I would send an email to WF re: we plan to provide an overview of revisions, etc. during tomorrow's call and the send after the call. I also want to hear from them re: why universal waste count was taken out by them.

Anything else you want me to add to the list?

Laura Welles
Attorney Advisor
Waste and Chemical Enforcement Division
Office of Civil Enforcement
U.S. Environmental Protection Agency
(202) 564-2754



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460



September 27, 2016

MEMORANDUM

SUBJECT: Consent Agreement and Proposed Final Order, *In re Suzuki Motor of America, Inc. and Suzuki Motor Corporation*, Docket No. CAA-HQ-2016-8274

FROM: Judge Mary Beth Ward *Mary Beth Ward*
Environmental Appeals Board

TO: Susan Shinkman, Director
Office of Civil Enforcement

In August 2016, the Office of Civil Enforcement submitted to the Environmental Appeals Board ("Board") a Consent Agreement to resolve this matter, requesting that the Board issue "a final order * * * ratifying" the Agreement pursuant to 40 C.F.R. § 22.18(b)(3). Upon receipt of the Consent Agreement, the matter was assigned to a panel of three Judges (Judges Mary Kay Lynch, Kathie A. Stein, and Mary Beth Ward (assigned as Lead Judge)) to decide whether to issue the final order as requested.

After an initial examination of the Agreement, however, the Board had questions as to whether it conforms to the requirements of the Consolidated Rules of Practice at 40 C.F.R. part 22, and in particular 40 C.F.R. §§ 22.18(c) and 22.31(a). Board staff consulted with the parties and received an email explaining the Office of Civil Enforcement's views on these issues. The Board has carefully considered the explanation submitted, but for the reasons set forth below, the Board finds that the explanation does not overcome a straightforward reading of part 22's requirements. The Board is therefore not prepared to ratify the Consent Agreement as submitted.

The Consent Agreement in paragraph 71 states that "[i]n accordance with 40 C.F.R. § 22.18(c), *completion of the terms of this Consent Agreement* and attached Final Order resolves *only* Respondents' liability for federal civil penalties for the violations and facts specifically alleged above." Consent Agreement ¶ 71 (emphases added). But the Consent Agreement also includes a provision in paragraph 72 stating that the Agency "covenants not to sue Respondents for injunctive or other equitable relief for the violations and facts alleged in this matter." *Id.* ¶ 72.

Paragraph 72 appears to conflict with the language in paragraph 71 limiting the scope of matters resolved by the Agreement. Paragraph 72 further conflicts with 40 C.F.R. §§ 22.18(c) and 22.31(a), because it affects the Agency's right to pursue injunctive or other equitable relief.

Specifically, part 22 of the Consolidated Rules of Practice expressly requires that a settlement not affect the Agency's or the United States' right to pursue injunctive or other equitable relief and that the scope of matters in a case settled by consent agreement be limited to a respondent's liability for federal civil penalties. See 40 C.F.R. pt. 22. Section 22.18(c) provides that:

Scope of resolution or settlement. Full payment of the penalty proposed in a complaint pursuant to paragraph (a) of this section or settlement pursuant to paragraph (b) of this section *shall not in any case affect the right of the Agency or the United States to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violations of law.* Full payment of the penalty proposed in a complaint pursuant to paragraph (a) of this section or settlement pursuant to paragraph (b) of this section *shall only resolve respondent's liability for Federal civil penalties* for the violations and facts alleged in the complaint.

Id. § 22.18(c) (emphases added).

In 40 C.F.R. § 22.18(c), the initial reference to “[f]ull payment of the penalty proposed” does not refer to a case settled by consent agreement. A settlement does not propose payment of a penalty, but rather is an agreement between the parties, including agreement on any penalty to be paid. Instead, the complete reference – “[f]ull payment of the penalty proposed in a complaint pursuant to paragraph (a)” – addresses “quick resolutions” of administrative enforcement actions under 40 C.F.R. § 22.18(a). Under section 22.18(a), a respondent may reach a “quick resolution” of such an action by “paying the specific penalty *proposed* in the complaint * * * *in full.*” *Id.* § 22.18(a) (emphases added).

The separate reference to “settlement pursuant to paragraph (b)” is the reference applicable here. That reference addresses “settlements” of administrative enforcement actions under 40 C.F.R. § 22.18(b). Under section 22.18(b), the parties may settle such an action at any time by recording the terms and conditions of the settlement in a written consent agreement and by having the consent agreement ratified by a final order. *Id.* § 22.18(b)(2), (b)(3).

And the title of 40 C.F.R. § 22.18(c) – “Scope of resolution or settlement” – similarly makes evident that section 22.18(c) addresses two different things: the full payment of a proposed penalty by quick resolution under section 22.18(a) and a settlement by consent agreement under section 22.18(b).

Thus, there are two subjects in the first and second sentences of 40 C.F.R. § 22.18(c): first, full payment of a proposed penalty by quick resolution, and second, settlement by consent agreement. And the limiting language of section 22.18(c) applies to both. That is, neither a quick resolution under section 22.18(a), nor a settlement by consent agreement under section 22.18(b), “shall *** affect the right of the Agency or the United States to pursue appropriate injunctive or other equitable relief” and “shall only resolve respondent’s liability for Federal civil penalties.” *Id.* § 22.18(c). | ✓

The Rules reiterate this limitation in the separate provision addressing final orders issued under part 22, including final orders ratifying consent agreements. Specifically, 40 C.F.R. § 22.31(a) provides that:

The final order shall not in any case affect the right of the Agency or the United States to pursue appropriate *injunctive or other equitable relief* or criminal sanctions for any violations of law.

Id. § 22.31(a) (emphasis added).

And the Rules elsewhere reinforce the fact that in issuing a final order under 40 C.F.R. § 22.31(a), the Board is issuing an order regarding not only the penalty amount, but the entire settlement, including all its terms and conditions. Under part 22, the Board “approves settlement of proceedings,” *id.* § 22.4(a), including “ratifying the parties’ consent agreement,” *id.* § 22.18(b)(3). In ratifying a consent agreement, the Board incorporates the agreement by reference into the final order and directs Respondents to comply with all of the agreement’s terms. *Environmental Appeals Board Consent Agreement and Final Order Procedures, Template for Final Orders* 3 (Jan. 14, 2014). Thus, the limitation in section 22.31(a) applies to ratification of all terms of the consent agreement, not just ratification of any agreed-upon penalty amount. / #

In the preamble to the proposed rule adopting the current versions of 40 C.F.R. §§ 22.18(c) and 22.31(a), the Administrator underscored their meaning as limiting the scope of matters resolved in a settlement by consent agreement and in the final order ratifying that agreement. In addressing 40 C.F.R. § 22.18(c), the Administrator discussed the effect of both “settlements” by consent agreement (notably *not* the effect of full payment of a penalty proposed in a settlement) and “full payment of proposed penalties” by quick resolution, stating that:

Paragraph [22.18](c) would provide that the effect of *settlements* and *full payment of proposed penalties* is limited to those facts and violations specifically alleged in the complaint, and *reserves the Agency’s right to pursue injunctive relief* or criminal sanctions. * * * Because the statutes authorizing administrative proceedings expressly limit the Agency’s authority in those proceedings, the settlement of a proceeding commenced under part 22 cannot limit the Agency’s right to pursue relief that is beyond the scope of part 22.

Consolidated Rules of Practice, 63 Fed. Reg. 9464, 9471 (proposed Feb. 28, 1998) (emphases added).

In reference to 40 C.F.R. § 22.31(a), the Administrator stated in the proposed rule preamble that:

[The final order] *shall not affect the government’s right to injunctive relief* or criminal sanctions. * * * Including these provisions in [part 22] would provide a clear limit to the scope of final orders, regardless of whether the final orders are consent orders, final decisions on appeal, or unappealed initial decisions.

Id. at 9475 (emphasis added).

And in the final rule preamble, the Administrator reiterated that “Paragraph [22.18](c) * * * reserves the Agency’s right to pursue injunctive relief or criminal sanctions.” Consolidated Rules of Practice, 64 Fed. Reg. 40,138, 40,157 (July 23, 1999); *see also In re Carbon Injection Systems, LLC*, RCRA Appeal No. 15-01, slip op. at 39 (EAB Feb. 2, 2016), 17 E.A.D. ____ (the

Administrator's interpretation of the meaning of a regulation in a final rule preamble is an authoritative interpretation).

As noted above, Board staff consulted with the parties for an explanation of the Agency's authority to grant a covenant not to sue for injunctive or equitable relief, given the language of 40 C.F.R. §§ 22.18(c) and 22.31(a). And the Board has carefully considered the explanation submitted, but finds that the explanation does not overcome the straightforward reading of the regulations, a reading consistent with the contemporaneous description of them in the proposed and final rule preambles. While the Board recognizes that it has on a few prior occasions ratified consent agreements containing similar covenants not to sue for injunctive and equitable relief, the Board did not address this issue in its consideration of those consent agreements or orders approving them. Thus, those prior orders do not serve as precedent for approving the Consent Agreement here. *Cf. Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 144-45 (2011) (when questions of jurisdiction have been passed on in prior decisions *sub silentio*, the Court is not bound when a subsequent case finally brings the issue to the Court's attention; "[t]he Court would risk error if it relied on assumptions that have gone unstated and unexamined"); *Korwek v. Hunt*, 827 F.2d 874, 877 (2d Cir. 1987) ("The issue never was briefed, argued, or decided. * * * Such a *sub silentio* holding is not binding precedent, * * * and this panel is not constrained to follow it." (internal quotation marks and citations omitted)).

Accordingly, if the parties resubmit the proposed Consent Agreement without paragraph 72, the Board is prepared to issue a final order ratifying the Consent Agreement. The Board, however, is not prepared to ratify the Consent Agreement with paragraph 72 included. The Board is therefore returning the proposed Consent Agreement and closing out this matter on its docket.

cc: Jeremy Peterson, Esq.
Jonathan Martel, Esq.
Arnold & Porter LLP
601 Massachusetts Ave., NW
Washington, DC 20001

Evan Belser, Esq.
Kathryn Pirrotta Caballero, Esq.
Office of Civil Enforcement
Air Enforcement Division
1200 Pennsylvania Ave., NW
Mail Code 2242A
Washington, DC 20004

Message

From: Welles, Laura [Welles.Laura@epa.gov]
Sent: 11/10/2016 2:12:02 PM
To: Fogarty, Johnpc [Fogarty.Johnpc@epa.gov]
Subject: RE: WF -- revised draft

Hold that thought – I'll send you a version that has all EPA redline based on the version WF sent to us.

From: Fogarty, Johnpc
Sent: Thursday, November 10, 2016 8:50 AM
To: Welles, Laura <Welles.Laura@epa.gov>
Subject: RE: WF -- revised draft

Yes, thanks I do want to review this again before we share it w/WF. But I'm sort of confused by what you mean about accepting your earlier edits as well as mine – does that mean that this draft is not showing the differences from what they sent in redline/strikeout?

From: Welles, Laura
Sent: Wednesday, November 09, 2016 5:40 PM
To: Fogarty, Johnpc <Fogarty.Johnpc@epa.gov>
Subject: WF -- revised draft

I'm not sure you want to see this again, but I made some adjustments – I accepted my earlier edits, as well as your edits.

Ex. 5 AC/AWP/DP

All edits added later today are in track changes.

I met with Diana and Andy –

Ex. 5 AC/AWP/DP

Ex. 5 AC/AWP/DP

Ex. 5 AC/AWP/DP

The headings may be a bit different, but I've found that many CAFOs are all over the place with headings, etc.

I was thinking that I would send an email to WF re: we plan to provide an overview of revisions, etc. during tomorrow's call and the send after the call. I also want to hear from them re: why universal waste count was taken out by them.

Anything else you want me to add to the list?

Laura Welles
Attorney Advisor
Waste and Chemical Enforcement Division
Office of Civil Enforcement
U.S. Environmental Protection Agency
(202) 564-2754

Message

From: Welles, Laura [Welles.Laura@epa.gov]
Sent: 10/25/2016 9:30:01 PM
To: Fogarty, Johnpc [Fogarty.Johnpc@epa.gov]
Subject: FW: Economic Benefit question re: Specialty Materials Business Trust d/b/a Specialty Materials, Inc.
Attachments: SMI.BEN.Assumptions.Waste Determination.docx

I haven't calculated a penalty yet in WF, but here's an EB calculation re: HW determination from a Region 1 case. The region calculated the EB, but found it to be negligible/de minimus and so per the RCRA penalty policy it did not pursue the amount as part of the enforcement action.

From: Foot, Christine
Sent: Tuesday, October 25, 2016 11:29 AM
To: Welles, Laura <Welles.Laura@epa.gov>
Subject: RE: Economic Benefit question re: Specialty Materials Business Trust d/b/a Specialty Materials, Inc.

Sure thing. Sorry I can't be more specific about this document, but Sue (Nachmann) certainly could....

Christine

.....
Christine M. Foot
Enforcement Counsel
US EPA - New England
5 Post Office Sq., Suite 100 OES04-2
Boston, MA 02109-3912
617-918-1333

From: Welles, Laura
Sent: Tuesday, October 25, 2016 11:26 AM
To: Foot, Christine <Foot.Christine@epa.gov>
Subject: Economic Benefit question re: Specialty Materials Business Trust d/b/a Specialty Materials, Inc.

Christine,

It was good to talk to you a few minutes ago regarding my EB question.

I'll take a further look at the calculation and let you or Sue know if I have any other questions.

Thanks,
Laura

Laura Welles
Attorney Advisor
Waste and Chemical Enforcement Division
Office of Civil Enforcement
U.S. Environmental Protection Agency
(202) 564-2754

Message

From: Welles, Laura [Welles.Laura@epa.gov]
Sent: 9/30/2016 3:56:20 PM
To: Jennifer Hartman King [JHartmanKing@KingWilliamsLaw.com]; John Hempfling (CE CEN) [John.Hempfling@wholefoods.com]
CC: Fogarty, Johnpc [Fogarty.Johnpc@epa.gov]
Subject: RE: Follow up to EPA/Whole Foods Market 9/27 meeting

Great -- thank you.

Laura Welles
Attorney Advisor
Waste and Chemical Enforcement Division
Office of Civil Enforcement
U.S. Environmental Protection Agency
(202) 564-2754

From: Jennifer Hartman King [mailto:JHartmanKing@KingWilliamsLaw.com]
Sent: Friday, September 30, 2016 11:43 AM
To: John Hempfling (CE CEN) <John.Hempfling@wholefoods.com>; Welles, Laura <Welles.Laura@epa.gov>
Cc: Fogarty, Johnpc <Fogarty.Johnpc@epa.gov>
Subject: RE: Follow up to EPA/Whole Foods Market 9/27 meeting

That works great for me, as well. I will circulate a call-in number. Thanks, all.

Jennifer Hartman King, Managing Partner



520 Capitol Mall, Suite 750
Sacramento, CA 95814
916-379-7530 – Main phone
916-379-7533 – Direct dial
916-379-7535 – Fax
Email: JHartmanKing@KingWilliamsLaw.com

Website: www.KingWilliamsLaw.com
[Click Here for King Williams LLP News and Alerts](#)

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From: John Hempfling (CE CEN) [mailto:John.Hempfling@wholefoods.com]
Sent: Friday, September 30, 2016 6:38 AM
To: Welles, Laura <Welles.Laura@epa.gov>
Cc: Jennifer Hartman King <JHartmanKing@KingWilliamsLaw.com>; Fogarty, Johnpc <Fogarty.Johnpc@epa.gov>
Subject: Re: Follow up to EPA/Whole Foods Market 9/27 meeting

Hey Laura:

That time works for me.

Thanks,

John

Sent from my iPhone

On Sep 30, 2016, at 08:24, Welles, Laura <Welles.Laura@epa.gov> wrote:

John:

Thanks for getting back to me so quickly with your availability for next week.

Wednesday (10/5) afternoon works best for us – anytime between 1:00 and 4:00 pm EST. I was thinking we could go with 2:00 to 3:00pm EST.

Let me know if this timing on Wednesday still works for you and Jenn.

Laura

Laura Welles
Attorney Advisor
Waste and Chemical Enforcement Division
Office of Civil Enforcement
U.S. Environmental Protection Agency
(202) 564-2754

From: John Hempfling (CE CEN) [mailto:John.Hempfling@wholefoods.com]

Sent: Thursday, September 29, 2016 4:27 PM

To: Welles, Laura <Welles.Laura@epa.gov>; Jennifer Hartman King
<jhartmanking@kingwilliamslaw.com>

Cc: Fogarty, Johnpc <Fogarty.Johnpc@epa.gov>

Subject: RE: Follow up to EPA/Whole Foods Market 9/27 meeting

Hi Laura:

Thank you for your email. We look forward to talking with you and John next week. Here is our availability for early next week:

Tuesday (9/4): Any time

Wednesday (9/5): Any time except 5:30 pm CDT

Please just bear in mind that Jenn is on PDT and I am on CDT.

Thanks,

John

John H. Hempfling II
Sr. Global Litigation Counsel
Whole Foods Market Central Office
550 Bowie Street
Austin, Texas 78703
(512) 542-0213 (Office)
(512) 482-7213 (Fax)

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From: Welles, Laura [<mailto:Welles.Laura@epa.gov>]
Sent: Thursday, September 29, 2016 10:36 AM
To: John Hempfling (CE CEN) <John.Hempfling@wholefoods.com>; Jennifer Hartman King <jhartmanking@kingwilliamsllaw.com>
Cc: Fogarty, Johnpc <Fogarty.Johnpc@epa.gov>
Subject: Follow up to EPA/Whole Foods Market 9/27 meeting

John and Jenn:

Thank you for meeting with us earlier this week to begin the dialogue on crafting a national settlement with Whole Foods Market (WFM). As a first step, John Fogarty and I would like to set up a conference call for early next week to discuss both the corporate structure of WFM, including its affiliated companies (i.e., parent, subsidiaries and related corporations), as well as the organizational structure of WFM and its affiliated companies, including hierarchy, regional divisions, and the structure within each regional division. Any materials on this that you can share would be particularly helpful. We want to make sure that the agreement's provisions will cover the relevant corporate entities for purposes of national settlement. In addition, it would be helpful to provide a list of all WFM affiliated stores (excluding those covered by the Region 6 CAFO), organized by state in a format similar to the Appendix in the Region 6 CAFO.

Time permitting (or if not during this call, during a second one shortly thereafter), we would also like to hear a more detailed description of the Ex. 4 CBI

Ex. 4 CBI in particular WFM's plans for an electronic database and use of handheld terminal. We are also interested in learning more about the training and guidance materials associated with WFM's hazardous waste management program (e.g., employee training, hazardous waste determination guidance charts, etc.). This will help us to draft settlement provisions that will reflect WFM's current and planned practices for monitoring, controlling, and ensuring that appropriate hazardous waste management practices are followed at all of its stores nationwide.

We will also need to set aside some time soon to talk about potential SEP ideas. Ordinarily we don't discuss SEPs until late in the negotiation process, but in order to try and expedite things, in this case we think it probably makes sense to start that discussion earlier.

Please send me some dates and times that you are available next week for a conference call regarding the above items. Once I hear from you, I'll coordinate with John to set up a meeting. In the meantime, let me know if you have any questions.

Laura

Laura Welles
Attorney Advisor
Waste and Chemical Enforcement Division
Office of Civil Enforcement
U.S. Environmental Protection Agency
(202) 564-2754

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Message

From: Welles, Laura [Welles.Laura@epa.gov]
Sent: 11/8/2016 9:21:58 PM
To: Fogarty, Johnpc [Fogarty.Johnpc@epa.gov]
Subject: RE: WF audit - draft #1

Got it.

With regard to the intel,

Ex. 5 AC/AWP/DP

-----Original Message-----

From: Fogarty, Johnpc
Sent: Tuesday, November 08, 2016 4:20 PM
To: Welles, Laura <Welles.Laura@epa.gov>
Subject: RE: WF audit - draft #1

I am not looking at anything tonight.

-----Original Message-----

From: Welles, Laura
Sent: Tuesday, November 08, 2016 4:19 PM
To: Fogarty, Johnpc <Fogarty.Johnpc@epa.gov>
Subject: RE: WF audit - draft #1

Ok -- I'm just finishing up on the compliance piece and will send to you within the hour (from now).

-----Original Message-----

From: Fogarty, Johnpc
Sent: Tuesday, November 08, 2016 4:15 PM
To: Welles, Laura <Welles.Laura@epa.gov>
Subject: RE: WF audit - draft #1

If you can share what you have now, that would be great. And yes, it may make sense to talk through a few major issues/areas.

Ex. 5 AC/AWP/DP

-----Original Message-----

From: Welles, Laura
Sent: Tuesday, November 08, 2016 3:54 PM
To: Fogarty, Johnpc <Fogarty.Johnpc@epa.gov>
Subject: RE: WF audit - draft #1

Quick update:

I plan to meet with Diana and Andy tomorrow morning at 9:30 re: make sure revised draft is consistent with what WEB has sent to EAB in the past. Do you want to see draft of the revised CAFO later today or wait until after I meet with them in case there are some minor changes, etc.?

Ex. 5 AC/AWP/DP

What are your thoughts on when to get the revised draft back to WF? I want to hear from WF about why they took count II out, etc. and so it may make more sense to explain Thursday during the call re: big picture on what changes we made, get more info on count II, and then send revised draft after the Thursday call. Thoughts?

Also -- I did touch base with Gary J. re: paperwork reduction and ex parte waivers. He was very helpful - thanks for the suggestion to speak with him.

Ex. 5 AC/AWP/DP

Ex. 5 AC/AWP/DP

-----Original Message-----

From: Welles, Laura
Sent: Tuesday, November 08, 2016 8:40 AM
To: Fogarty, Johnpc <Fogarty.Johnpc@epa.gov>
Subject: RE: WF audit - draft #1

Moving along -- I plan to get a revised draft to you later this afternoon.

-----Original Message-----

From: Fogarty, Johnpc
Sent: Tuesday, November 08, 2016 8:38 AM
To: Welles, Laura <Welles.Laura@epa.gov>
Subject: RE: WF audit - draft #1

Ok, thx. How's the revisions to the cafo coming?

-----Original Message-----

From: Welles, Laura
Sent: Tuesday, November 08, 2016 8:14 AM
To: Fogarty, Johnpc <Fogarty.Johnpc@epa.gov>
Subject: RE: WF audit - draft #1

I'll take a look at this today and get back to you with any feedback.

-----Original Message-----

From: Fogarty, Johnpc
Sent: Friday, November 04, 2016 5:01 PM
To: Welles, Laura <Welles.Laura@epa.gov>
Subject: WF audit - draft #1

Draft CAFO language and a revised explanation/description.

Ex. 5 AC/AWP/DP

Ex. 5 AC/AWP/DP The CAFO provisions is set up as an appendix, to make drafting that part easier (the placeholder in the main body can just refer to it). This is a first cut, but would appreciate your feedback. Thx!

Message

From: Welles, Laura [Welles.Laura@epa.gov]
Sent: 9/30/2016 1:38:19 PM
To: Fogarty, Johnpc [Fogarty.Johnpc@epa.gov]
Subject: RE: Follow up to EPA/Whole Foods Market 9/27 meeting

I'll send you a hold via outlook for Wednesday (10/5) afternoon.

Also – I figure we'll be initiating the call and so when I get a response from WFM, I'll confirm contact numbers, etc.

From: Fogarty, Johnpc
Sent: Thursday, September 29, 2016 7:01 PM
To: Welles, Laura <Welles.Laura@epa.gov>
Subject: Re: Follow up to EPA/Whole Foods Market 9/27 meeting

Agh! If it's something other than a division general, then I CAN'T miss it. Duh...

Sent from my iPhone

On Sep 29, 2016, at 6:02 PM, Fogarty, Johnpc <Fogarty.Johnpc@epa.gov> wrote:

Take a look at my calendar (everyone is supposed to be able to see it) – if it's a division general, I can miss it, but if it's something else I can be available. Something mid-day or later would be best since west coast time is part of the equation.

From: Welles, Laura
Sent: Thursday, September 29, 2016 5:12 PM
To: Fogarty, Johnpc <Fogarty.Johnpc@epa.gov>
Subject: FW: Follow up to EPA/Whole Foods Market 9/27 meeting

Tuesday (9/4) – I can meet from 1:30 to 3:00 and then anytime between 4 and 6.

Wednesday (9/5) – My schedule is flexible between 10 and 6.

Let me know what works for you and then I'll get back to John and Jenn tomorrow.

From: John Hempfling (CE CEN) [<mailto:John.Hempfling@wholefoods.com>]
Sent: Thursday, September 29, 2016 4:27 PM
To: Welles, Laura <Welles.Laura@epa.gov>; Jennifer Hartman King <jhartmanking@kingwilliamslaw.com>
Cc: Fogarty, Johnpc <Fogarty.Johnpc@epa.gov>
Subject: RE: Follow up to EPA/Whole Foods Market 9/27 meeting

Hi Laura:

Thank you for your email. We look forward to talking with you and John next week. Here is our availability for early next week:

Tuesday (9/4): Any time

Wednesday (9/5): Any time except 5:30 pm CDT

Please just bear in mind that Jenn is on PDT and I am on CDT.

Thanks,

John

John H. Hempfling II
Sr. Global Litigation Counsel
Whole Foods Market Central Office
550 Bowie Street
Austin, Texas 78703
(512) 542-0213 (Office)
(512) 482-7213 (Fax)

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From: Welles, Laura [<mailto:Welles.Laura@epa.gov>]
Sent: Thursday, September 29, 2016 10:36 AM
To: John Hempfling (CE CEN) <John.Hempfling@wholefoods.com>; Jennifer Hartman King <jhartmanking@kingwilliamsllaw.com>
Cc: Fogarty, Johnpc <Fogarty.Johnpc@epa.gov>
Subject: Follow up to EPA/Whole Foods Market 9/27 meeting

John and Jenn:

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Time permitting (or if not during this call, during a second one shortly thereafter), we would also like to hear a more detailed description of the

Ex. 4 CBI

Ex. 4 CBI

in particular WFM's plans for an electronic database and use of handheld terminal. We are also interested in learning more about the training and guidance materials associated with WFM's hazardous waste management program (e.g., employee training, hazardous waste determination guidance charts, etc.). This will help us to draft settlement provisions that will reflect WFM's current and planned practices for monitoring, controlling, and ensuring that appropriate hazardous waste management practices are followed at all of its stores nationwide.

We will also need to set aside some time soon to talk about potential SEP ideas. Ordinarily we don't discuss SEPs until late in the negotiation process, but in order to try and expedite things, in this case we think it probably makes sense to start that discussion earlier.

Please send me some dates and times that you are available next week for a conference call regarding the above items. Once I hear from you, I'll coordinate with John to set up a meeting. In the meantime, let me know if you have any questions.

Laura

Laura Welles
Attorney Advisor
Waste and Chemical Enforcement Division
Office of Civil Enforcement
U.S. Environmental Protection Agency
(202) 564-2754

Message

From: Welles, Laura [Welles.Laura@epa.gov]
Sent: 9/30/2016 3:22:59 PM
To: Fogarty, Johnpc [Fogarty.Johnpc@epa.gov]
Subject: RE: RCRA - SEPs

It was – everything from tires to nail polish salons.

Ex. 5 AC/AWP/DP

An important piece is to look at the ingredients in the waste and go from there re: link between pollutant and health effects.

Ex. 5 AC/AWP/DP

It will be interesting to hear from WFM re: SEP ideas.

From: Fogarty, Johnpc
Sent: Friday, September 30, 2016 10:54 AM
To: Welles, Laura <Welles.Laura@epa.gov>
Subject: RE: RCRA - SEPs

Thanks – heard from Caroline at the party that it was a pretty interesting discussion.

From: Welles, Laura
Sent: Thursday, September 29, 2016 1:21 PM
To: Fogarty, Johnpc <Fogarty.Johnpc@epa.gov>
Subject: FW: RCRA - SEPs

FYI – meeting re: brainstorming SEPs this afternoon from 2 to 3. I can fill you in re: any ideas, etc.

From: Welles, Laura
Sent: Thursday, September 29, 2016 11:51 AM
To: Makepeace, Caroline <Makepeace.Caroline@epa.gov>; Cavalier, Beth <Cavalier.Beth@epa.gov>; Saenz, Diana <Saenz.Diana@epa.gov>; Crossland, Andy <Crossland.Andy@epa.gov>
Subject: RE: RCRA - SEPs

I'm not sure whether this fits within the scope of a SEP for this case,

Ex. 5 AC/AWP/DP

Ex. 5 AC/AWP/DP

Ex. 5 AC/AWP/DP

Thanks,

Laura << File: Cmty. Ass_n for Restoration of the Env_t v. Cow Palace_ LLC_ 80 F. Supp. 3d 1180.pdf >>

From: Makepeace, Caroline

Sent: Wednesday, September 28, 2016 12:46 PM

To: Welles, Laura <Welles.Laura@epa.gov>; Cavalier, Beth <Cavalier.Beth@epa.gov>; Saenz, Diana <Saenz.Diana@epa.gov>; Crossland, Andy <Crossland.Andy@epa.gov>

Subject: RE: RCRA - SEPs

Thanks, Laura!

Caroline Makepeace
Chief, Litigation and Cross-Cutting Policy Branch, and
Acting Chief, Litigation and Audit Policy Branch
Special Litigation and Projects Division
Office of Civil Enforcement
US Environmental Protection Agency
202-564-6012

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From: Welles, Laura

Sent: Wednesday, September 28, 2016 12:39 PM

To: Makepeace, Caroline <Makepeace.Caroline@epa.gov>; Cavalier, Beth <Cavalier.Beth@epa.gov>; Saenz, Diana <Saenz.Diana@epa.gov>; Crossland, Andy <Crossland.Andy@epa.gov>

Subject: RE: RCRA - SEPs

The context is similar to Region 6's recent settlement with Whole Foods –
<https://www.epa.gov/newsreleases/whole-foods-agrees-improve-waste-management-epa-settlement>

R6's CAFO involved two RCRA counts: (1) failure to make HW determinations and (2) failure to comply with the Universal Waste Requirements (see attached CAFO).

<< File: 6ENH.Whole Foods Market CAFO.TX.09.19.16.pdf >>

I hope this helps.

Laura

Laura Welles
Attorney Advisor
Waste and Chemical Enforcement Division
Office of Civil Enforcement
U.S. Environmental Protection Agency
(202) 564-2754

From: Makepeace, Caroline

Sent: Wednesday, September 28, 2016 12:12 PM

To: Cavalier, Beth <Cavalier.Beth@epa.gov>; Saenz, Diana <Saenz.Diana@epa.gov>; Crossland, Andy <Crossland.Andy@epa.gov>; Welles, Laura <Welles.Laura@epa.gov>

Subject: RE: RCRA - SEPs

Yes, please, that'd be most efficient and effective, instead of just starting the wheels turning tomorrow afternoon -- especially if you are in any hurry. Can't really do SEP analysis without specific context.

Caroline Makepeace
Chief, Litigation and Cross-Cutting Policy Branch, and
Acting Chief, Litigation and Audit Policy Branch
Special Litigation and Projects Division
Office of Civil Enforcement
US Environmental Protection Agency
202-564-6012

This may contain enforcement confidential or privileged material. Do not release without appropriate review. If you have received this message in error, please inform the sender, and promptly delete.

From: Cavalier, Beth

Sent: Wednesday, September 28, 2016 10:33 AM

To: Makepeace, Caroline <Makepeace.Caroline@epa.gov>; Saenz, Diana <Saenz.Diana@epa.gov>; Crossland, Andy <Crossland.Andy@epa.gov>; Welles, Laura <Welles.Laura@epa.gov>

Subject: RE: RCRA - SEPs

Diana, Andy, Laura -- it would be helpful to know what sort of violations you are dealing with, as the nexus requirement will depend greatly on the type of violation, the pollutant, the impacts.... Can you provide any information about the enforcement action in question ahead of the meeting? Thanks!!

Beth

From: Makepeace, Caroline

Sent: Wednesday, September 28, 2016 10:25 AM

To: Saenz, Diana <Saenz.Diana@epa.gov>; Cavalier, Beth <Cavalier.Beth@epa.gov>; Crossland, Andy <Crossland.Andy@epa.gov>; Welles, Laura <Welles.Laura@epa.gov>

Subject: RE: RCRA - SEPs

Look forward to talking, but just a heads-up that I need to leave for the 1st item at the Cynthia general at 3. See you tomorrow.

Caroline Makepeace
Chief, Litigation and Cross-Cutting Policy Branch, and
Acting Chief, Litigation and Audit Policy Branch
Special Litigation and Projects Division
Office of Civil Enforcement

US Environmental Protection Agency
202-564-6012

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-----Original Appointment-----

From: Saenz, Diana

Sent: Wednesday, September 28, 2016 10:23 AM

To: Makepeace, Caroline; Cavalier, Beth; Crossland, Andy; Welles, Laura

Subject: RCRA - SEPs

When: Thursday, September 29, 2016 2:00 PM-3:00 PM (UTC-05:00) Eastern Time (US & Canada).

Where: [DCRoomARS4140VideoConf@epa.gov](https://epa.gov/join/videoconf/DCRoomARS4140VideoConf@epa.gov)

Brainstorm Potential RCRA SEPs.

ESTIMATING COSTS FOR THE ECONOMIC BENEFITS OF RCRA NONCOMPLIANCE

September 1997

December 1997 Update

U.S. Environmental Protection Agency
RCRA Enforcement Division
Office of Regulatory Enforcement
401 M Street, SW
Washington, DC 20460



Table 6-1. Hazardous Waste Determination - Small Generator Initial (Administrative) Costs (1997 Dollars)

Component	Participant	Type of Personnel(s)	Lower Bound Estimate Hours(a)	Upper Bound Estimate Hours(a)	Estimate Hours(a)	Cost(s)	Unit	Lower Bound Estimate Estimate 1 wastes(b)	Upper Bound Estimate Estimate 3 wastes(b)	Typical Estimate Estimate 2 wastes(b)
1. Background information collection/ review	Facility	Environ. Coord.	2	6	4	\$51	\$/hr	\$101	\$304	\$202
Subtotal	Facility Consultant	Clerical Project Engineer	1 4	2 8	1 6	\$21 \$103	\$/hr	\$21 \$411	\$43 \$823	\$21 \$617
2. Waste Determination	Consultant	Project Engineer	2	6	4	\$103	\$/hr	\$206	\$617	\$411
- Solid waste as defined by 40 CFR 261.2	Consultant	Project Engineer	2	4	3	\$103	\$/hr	\$206	\$411	\$309
- Waste(s) excluded by 40 CFR 261.4	Consultant	Project Engineer	4	8	6	\$103	\$/hr	\$411	\$823	\$617
- Waste listed in Part 261, Subpart D	Consultant	Project Engineer	8	18	13			\$823	\$1,851	\$1,337
Subtotal	Consultant	Project Engineer	1 10.5	3 13.5	2 12	\$103 \$39	\$/hr	\$103 \$414	\$309 \$532	\$206 \$473
3. Characteristic Waste Determination	Consultant	Project Engineer	1	3	2	\$103	\$/hr	\$103	\$309	\$206
- Determine Test Parameters	Consultant	Field Technician	10.5	13.5	12	\$39	\$/hr	\$414	\$532	\$473
- Waste Sample Collection	Consultant	Laboratory	3 samples	9 samples	6 samples		\$/sample			
- Waste Sample Analysis(c)	Consultant									
Subtotal	Consultant									
Total										

Footnotes:

- (a) DPRA, Incorporated, best professional judgement.
(b) Totals may not add because of rounding.
(c) Obtain price per sample from Table 6-3.

Message

From: Welles, Laura [Welles.Laura@epa.gov]
Sent: 10/31/2016 9:48:38 PM
To: Fogarty, Johnpc [Fogarty.Johnpc@epa.gov]
Subject: RE: RCRA - SEPs

Agreed.

From: Fogarty, Johnpc
Sent: Monday, October 31, 2016 4:33 PM
To: Welles, Laura <Welles.Laura@epa.gov>
Subject: RE: RCRA - SEPs

Ex. 5 AC/AWP/DP

From: Welles, Laura
Sent: Monday, October 31, 2016 4:32 PM
To: Fogarty, Johnpc <Fogarty.Johnpc@epa.gov>
Subject: RE: RCRA - SEPs

Good to know the points below.

Ex. 5 AC/AWP/DP

From: Fogarty, Johnpc
Sent: Monday, October 31, 2016 4:25 PM
To: Welles, Laura <Welles.Laura@epa.gov>
Subject: RE: RCRA - SEPs

Hmmm.....some thoughts/questions/reactions below -

From: Welles, Laura
Sent: Monday, October 31, 2016 3:22 PM
To: Fogarty, Johnpc <Fogarty.Johnpc@epa.gov>
Subject: FW: RCRA - SEPs

With regard to EB for HW determination, I sent this to Caroline Makepeace earlier today to check for consistency, etc.

Ex. 5 AC/AWP/DP

Ex. 5 AC/AWP/DP

Glad you found this!

Ex. 5 AC/AWP/DP

Does this make sense? Can you think of another way to approach this?

I'm working on the gravity numbers as we speak.

From: Welles, Laura
Sent: Monday, October 31, 2016 12:01 PM
To: Makepeace, Caroline <Makepeace.Caroline@epa.gov>
Subject: RE: RCRA - SEPs

Caroline,

Thanks for your call this morning. I called the contractor and I've attached a BEN calculation that reflects what the contractor advised me to do with this type of situation. Here's a summary of the steps:

Ex. 5 AC/AWP/DP

Ex. 5 AC/AWP/DP

How does this EB approach look to you? I want to make sure it's consistent, etc. I have to admit that I'm not the greatest with numbers...

Ex. 5 AC/AWP/DP

Thanks,
Laura

Laura Welles
Attorney Advisor
Waste and Chemical Enforcement Division
Office of Civil Enforcement
U.S. Environmental Protection Agency
(202) 564-2754

<< File: WF_EB HW determination_Small Generator Initial_Upper Bound Estimate_Background Review.pdf >> << File: 1997 RCRA EB cost estimates.pdf >>

From: Welles, Laura
Sent: Monday, October 31, 2016 9:34 AM
To: Makepeace, Caroline <Makepeace.Caroline@epa.gov>
Subject: RE: RCRA - SEPs

Caroline,

I'm working on the Whole Foods penalty calculation and I have a BEN question. Diana suggested I contact you to see who the point of contact is for BEN. My question relates to EB for failure to conduct hazardous waste determinations. I have some estimated costs using EPA's 1997 "Estimating Costs for the Economic Benefits of RCRA Noncompliance." What I'd like to do is use BEN to bring the estimated costs (1997 dollars) into today dollars. It's been a long time since I've used BEN and so I'm not sure how to make the conversion.

Thanks,
Laura

Laura Welles
Attorney Advisor
Waste and Chemical Enforcement Division
Office of Civil Enforcement
U.S. Environmental Protection Agency
(202) 564-2754

From: Makepeace, Caroline
Sent: Wednesday, September 28, 2016 12:46 PM

To: Welles, Laura <Welles.Laura@epa.gov>; Cavalier, Beth <Cavalier.Beth@epa.gov>; Saenz, Diana <Saenz.Diana@epa.gov>; Crossland, Andy <Crossland.Andy@epa.gov>

Subject: RE: RCRA - SEPs

Thanks, Laura!

Caroline Makepeace
Chief, Litigation and Cross-Cutting Policy Branch, and
Acting Chief, Litigation and Audit Policy Branch
Special Litigation and Projects Division
Office of Civil Enforcement
US Environmental Protection Agency
202-564-6012

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From: Welles, Laura

Sent: Wednesday, September 28, 2016 12:39 PM

To: Makepeace, Caroline <Makepeace.Caroline@epa.gov>; Cavalier, Beth <Cavalier.Beth@epa.gov>; Saenz, Diana <Saenz.Diana@epa.gov>; Crossland, Andy <Crossland.Andy@epa.gov>

Subject: RE: RCRA - SEPs

The context is similar to Region 6's recent settlement with Whole Foods –
<https://www.epa.gov/newsreleases/whole-foods-agrees-improve-waste-management-epa-settlement>

R6's CAFO involved two RCRA counts: (1) failure to make HW determinations and (2) failure to comply with the Universal Waste Requirements (see attached CAFO).

<< File: 6ENH.Whole Foods Market CAFO.TX.09.19.16.pdf >>

I hope this helps.

Laura

Laura Welles
Attorney Advisor
Waste and Chemical Enforcement Division
Office of Civil Enforcement
U.S. Environmental Protection Agency
(202) 564-2754

From: Makepeace, Caroline

Sent: Wednesday, September 28, 2016 12:12 PM

To: Cavalier, Beth <Cavalier.Beth@epa.gov>; Saenz, Diana <Saenz.Diana@epa.gov>; Crossland, Andy <Crossland.Andy@epa.gov>; Welles, Laura <Welles.Laura@epa.gov>

Subject: RE: RCRA - SEPs

Yes, please, that'd be most efficient and effective, instead of just starting the wheels turning tomorrow afternoon – especially if you are in any hurry. Can't really do SEP analysis without specific context.

Caroline Makepeace
Chief, Litigation and Cross-Cutting Policy Branch, and
Acting Chief, Litigation and Audit Policy Branch
Special Litigation and Projects Division
Office of Civil Enforcement
US Environmental Protection Agency
202-564-6012

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From: Cavalier, Beth
Sent: Wednesday, September 28, 2016 10:33 AM
To: Makepeace, Caroline <Makepeace.Caroline@epa.gov>; Saenz, Diana <Saenz.Diana@epa.gov>; Crossland, Andy <Crossland.Andy@epa.gov>; Welles, Laura <Welles.Laura@epa.gov>
Subject: RE: RCRA - SEPs

Diana, Andy, Laura – it would be helpful to know what sort of violations you are dealing with, as the nexus requirement will depend greatly on the type of violation, the pollutant, the impacts.... Can you provide any information about the enforcement action in question ahead of the meeting? Thanks!!

Beth

From: Makepeace, Caroline
Sent: Wednesday, September 28, 2016 10:25 AM
To: Saenz, Diana <Saenz.Diana@epa.gov>; Cavalier, Beth <Cavalier.Beth@epa.gov>; Crossland, Andy <Crossland.Andy@epa.gov>; Welles, Laura <Welles.Laura@epa.gov>
Subject: RE: RCRA - SEPs

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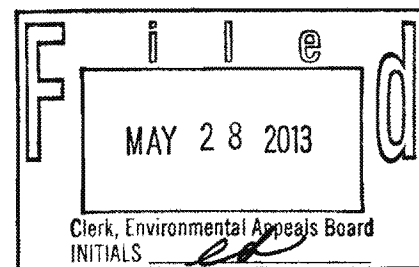
Where: DCRoomARS4140VideoConf@epa.gov

Brainstorm Potential RCRA SEPs.

) EPA Docket Nos.
) RCRA-HQ-2013-4001
) FIFRA-HQ-2013-5056

) Proceeding Under Section 3008(a) of the
) Resource Conservation and Recovery Act,
) 42 U.S.C. § 6928(a); Section 14(a) of the
) Federal Insecticide, Fungicide and
) Rodenticide Act, as amended, 7 U.S.C.
) § 136l(a)

—



CONSENT AGREEMENT AND FINAL ORDER

I. NATURE OF THE ACTION

1. This is a civil administrative action instituted under Section 3008(a) of the Solid Waste Disposal Act, as amended by the Resource Conservation Recovery Act of 1976 and the Hazardous and Solid Waste Amendments of 1984 (HSWA) (collectively “RCRA”), 42 U.S.C. § 6928(a); Section 14(a) of the Federal Insecticide, Fungicide and Rodenticide Act (“FIFRA” or “the Act”), as amended, 7 U.S.C. § 136l(a); and the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (“Consolidated Rules”), 40 C.F.R. Part 22 (2010). This action orders injunctive relief and civil penalties pursuant to Section 3008(a) of RCRA, 42 U.S.C. § 6928(a), and Section 14(a) of FIFRA, 7 U.S.C. § 136l(a).

2. The Consolidated Rules provide that where the parties agree to settlement of one or more causes of action before the filing of a complaint, a proceeding may be simultaneously commenced and concluded by the issuance of a CAFO. 40 C.F.R. §§ 22.13(b) and 22.18(b)(2).
3. Complainant and Respondent have conferred for the purpose of settlement pursuant to 40 C.F.R. § 22.18, and desire to settle this action. Accordingly, before any testimony has been taken upon the pleadings and without any admission of violation or adjudication of any issue of fact or law, and in accordance with 40 C.F.R. § 22.13(b), Complainant and Respondent have agreed to the execution of this CAFO. Respondent hereby agrees to comply with the terms of this CAFO.

II. THE PARTIES

4. Rosemarie A. Kelley, Director, Waste and Chemical Enforcement Division, Office of Civil Enforcement, Office of Enforcement and Compliance Assurance, is authorized, by lawful delegation, to institute and settle civil administrative actions brought pursuant to Section 3008(a) of RCRA, 42 U.S.C. § 6928(a), and Section 14(a) of FIFRA, 7 U.S.C. § 136l(a).
5. Respondent is Wal-Mart Stores, Inc. ("Walmart" or "Respondent"), a Delaware corporation doing business in the State of Arkansas, as well as any subsidiaries or affiliated companies of Walmart in all 50 states.

III. PRELIMINARY STATEMENTS

6. The terms of this CAFO constitute a full and final settlement between the parties for all claims for civil penalties and injunctive relief pursuant to Section 3008(a) of RCRA, 42 U.S.C. § 6928(a), and Section 14(a) of FIFRA, for the alleged violations of RCRA and FIFRA specified in Section XI of this CAFO. Except as provided in paragraph 111, compliance with this CAFO shall not be a defense to any other action arising out of Walmart's future conduct and commenced pursuant to federal, state, and local environmental laws and it is the responsibility of the Respondent to comply with all applicable provisions of RCRA, FIFRA, and any other

federal, state, or local laws and regulations. Nothing in this CAFO is intended to nor shall be construed to operate in any way to resolve any criminal liability of the Respondent.

7. Respondent admits the Stipulated Facts in Section VII of this CAFO. 40 C.F.R. § 22.18(b).
8. Respondent agrees to pay the civil penalties specified in Section XIII as full and final settlement for all civil claims specified in this CAFO. 40 C.F.R. § 22.18(b).
9. Each party to this CAFO shall bear its own costs and attorneys' fees in the action resolved by this CAFO.

IV. JURISDICTION AND WAIVER OF RIGHT TO HEARING

10. This CAFO is entered into pursuant to Section 3008(a) of RCRA, 42 U.S.C. § 6928(a); Section 14(a) of FIFRA, 7 U.S.C. § 1361(a); and the Consolidated Rules, 40 C.F.R. Part 22.
11. Pursuant to Section 3006 of RCRA, 42 U.S.C. § 6926, the Administrator of the EPA may authorize a state to administer the RCRA hazardous waste program in lieu of the federal program, when the Administrator finds that the state program meets certain conditions. Any violation of regulations promulgated pursuant to Subtitle C of RCRA, 42 U.S.C. §§ 6921-6939(e), or of any state provision authorized pursuant to Section 3006 of RCRA, 42 U.S.C. § 6926, constitutes a violation of RCRA, subject to the assessment of civil penalties and issuance of compliance orders as provided by Section 3008 of RCRA, 42 U.S.C. § 6928.
12. Pursuant to Section 3006 of RCRA, 42 U.S.C. § 6926, the Affected States have been authorized to administer the base RCRA hazardous waste program (requirements imposed by the Solid Waste Disposal Act prior to the Hazardous and Solid Waste Amendments of 1984) in lieu of the federal government's program.
13. The violations of RCRA described herein are alleged to have occurred in all Affected States and this compliance agreement covers Walmart Retail Facilities, Return Centers, and Distribution Centers in all Affected States, so citations to federal RCRA regulations are used for the parties' convenience. Respondent agrees that the terms of this compliance agreement govern its actions

but that States may impose requirements broader in scope than the federal regulations and this CAFO.

14. Pursuant to Section 3008(a) of RCRA, 42 U.S.C. § 6928(a) the Administrator may issue an order assessing a civil penalty for any past or current violation and require compliance immediately or within a specified time period.
15. Pursuant to Section 3008(a) of RCRA, 42 U.S.C. § 6928(a), EPA may enforce federally-authorized hazardous waste programs for violations of any requirement of Subtitle C of RCRA, Sections 3001-3023e, 42 U.S.C. §§ 6921-6939e.
16. Section 3006 of RCRA, 42 U.S.C. § 6926, as amended, provides, *inter alia*, that authorized state hazardous waste programs are carried out under Subtitle C of RCRA. Therefore, a violation of any requirement of law under an authorized state hazardous waste program is a violation of a requirement of Subtitle C of RCRA.
17. EPA has provided notice of commencement of this action to all authorized states pursuant to Section 3008(a)(2) of RCRA, 42 U.S.C. § 6928(a)(2).
18. For the purpose of the CAFO, Respondent admits the jurisdictional allegations set out in this consent agreement and waives any defenses it might have to venue and jurisdiction. Solely for the purpose of the approval of this CAFO by the Environmental Appeals Board (“EAB”), Respondent agrees not to assert before the EAB any statute of limitations affirmative defense it might have for the RCRA and FIFRA violations alleged in Section XI.
19. Except as provided in paragraphs 7 and 18, above, Respondent neither admits nor denies the factual allegations and legal conclusions set out in this CAFO.
20. Respondent waives any right it may have to contest the allegations and its right to appeal the proposed Final Order accompanying this Consent Agreement for purposes of this CAFO only.

21. Respondent waives any right it may have to challenge the validity of this CAFO and the settlement of the matters addressed in this CAFO based on any issue related to the Paperwork Reduction Act.
22. Respondent waives any right it may have pursuant to 40 C.F.R. § 22.8 to be present during any discussions, with, or to be served with and reply to, any memorandum or communication addressed to EPA officials where the purpose of such discussion, memorandum or communication is to persuade such official to accept and issue this CAFO so long as the EPA Officials provide Respondent with notice and, if written, a copy of such memorandum or communication from any third party.

V. PARTIES BOUND

23. This CAFO applies to and is binding upon the Complainant and the Respondent. Successors and assigns of Respondent are also bound if they are owned, in whole or part, directly or indirectly, by Respondent. Nothing in the previous sentence shall adversely affect any right of EPA under applicable law to assert successor or assignee liability against Respondent's successor or assignee, even if not owned in whole or in part, directly or indirectly, by Respondent.
24. Each Party certifies that at least one of its undersigned representatives is fully authorized by the Party whom he or she represents to enter into the terms and conditions of the CAFO, to execute it on behalf of that Party, and to legally bind the Party on whose behalf he or she signs this CAFO.

VI. DEFINITIONS

25. Unless otherwise expressly provided herein, terms used in the CAFO that are defined in RCRA, 42 U.S.C. §§ 6902-6991i, or in regulations promulgated under RCRA, 40 C.F.R. Parts 260-270, or in a state's authorized hazardous waste program, shall have the same meaning assigned to them in RCRA or in such regulations or applicable authorized state hazardous waste program. Terms used in this CAFO that are defined in FIFRA, 7 U.S.C. §§ 136-136y, or in regulations

promulgated under FIFRA at 40 C.F.R. Parts 152-169, shall have the same meaning assigned to them in FIFRA or in such regulations.

26. Whenever terms listed below are used in this CAFO, the following definitions shall apply:

- a. "Affected State" shall mean a state in which a Walmart Retail Facility is located as specified in Appendix C of this CAFO.
- b. "Business Day" means any day other than Saturday, Sunday, or a federal or legal holiday.
- c. "Claims Supervisor" means a Walmart Retail Facility Associate as described in Paragraph 94(d) and assigned the title claims supervisor (or similar title) for Stores. Claims Supervisors' job responsibilities will include accountability for hazardous waste management issues.
- d. "Conditionally Exempt Small Quantity Generator" means a facility that generates less than 100 kg of hazardous waste in a calendar month.
- e. "Consent Agreement and Final Order" or "CAFO" shall mean this Consent Agreement and attached Final Order and all Attachments hereto. In the event of conflict between this Consent Agreement and any Attachment, this Consent Agreement shall control.
- f. "Consumer Products" shall mean products sold in consumer product packaging which are transported as part of the Reverse Distribution Process.
- g. "Clubs" means the members-only retail facilities operated by Wal-Mart Stores, Inc. under the name Sam's Club, or any future such facility.
- h. "Distribution Center" means a distribution center facility, or any future such facility, operated by Walmart for the distribution of new products from vendors to Walmart's Retail Facilities.
- i. "EPA" means the U.S. Environmental Protection Agency.
- j. "Establishment" means "any place where a pesticide or device or active ingredient used in producing a pesticide is produced, or held, for distribution or sale," 7 U.S.C. § 136(dd).

In the Matter of Wal-Mart Stores, Inc: RCRA HQ 2013-4001; FIFRA HQ 2013-5056

- k. "FIFRA" means the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136 *et seq.*
- l. "Large Quantity Generator" means a facility that generates 1000 kg or more of hazardous waste in a calendar month.
- m. "Notify" and "Submit" and other terms signifying an obligation to transmit or communicate documents and information mean to deliver in person, deposit in the U.S. mail or dispatch by express courier not later than the day that such transmission or communication is required by this CAFO. If that day is not a business day then the delivery, deposit, or dispatch shall be made the next business day.
- n. "Paragraph" shall mean a portion of this CAFO identified by an arabic numeral and, in some cases, an associated lower case letter.
- o. "Parties" shall mean U.S. EPA and Respondent.
- p. "Pesticidal product" means "a pesticide, active ingredient, or device." 40 C.F.R. § 167.3.
- q. "Pesticide" means, in relevant part, "(1) any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest, (2) any substance or mixture of substances intended for use as a plant regulator, defoliant, or desiccant, and (3) any nitrogen stabilizer" 7 U.S.C. § 136(u).
- r. "Pesticide product" means, in relevant part, "a pesticide in the particular form (including composition, packaging, and labeling) in which the pesticide is, or is intended to be, distributed or sold. ..." 40 C.F.R. § 152.3.
- s. This paragraph intentionally left blank.
- t. "RCRA" means the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 *et seq.*

In the Matter of Wal-Mart Stores, Inc: RCRA HQ 2013-4001; FIFRA HQ 2013-5056

- u. "Respondent" shall mean Wal-Mart Stores, Inc. and its successors and assigns, as well as any subsidiaries or affiliated companies of Walmart.
- v. "Responsible Official" means an official of Walmart who is in charge of a principal business function, or any other person who performs similar policy or decision-making functions for Walmart.
- w. "Return Center" means the six reverse distribution facilities operated by Walmart or on Walmart's behalf and located in Bentonville, Arkansas; Las Vegas, Nevada; Waco, Texas; Spartanburg, South Carolina; Indianapolis, Indiana; and Johnstown, New York; the facility previously located in Macon, Georgia, and any future such facility utilized as part of the Reverse Distribution Process or any new location for an above identified facility.
- x. "Reverse Distribution Process" or "Reverse Distribution System" means a process for consolidating returned, recalled or other items in centralized Return Centers from Retail Facilities and Distribution Centers, one of the purposes of which is waste minimization through bulk resale of items, donation of items, return to manufacturer, or proper handling as waste. The items transported to a Return Center may have first been transported through a Distribution Center and consolidated prior to transfer to the Return Center.
- y. "Retail Facility Associate" means a Walmart Retail Facility employee.
- z. "Section" shall mean a portion of this CAFO identified by a roman numeral.
- aa. "Small Quantity Generator" means a facility who generates more than 100 kg and less than 1000 kg of hazardous waste in a calendar month.
- bb. "Solid Waste" shall mean any discarded material that is not excluded by 40 C.F.R. § 261.4(a) or that is not excluded by variance granted under §§ 260.30 and 260.31. For purposes of this CAFO with specific respect to Walmart Retail Facilities, discarded material means all Consumer Products under Respondent's control that cannot be sold at a Walmart Retail Facility or used by Walmart, and for which Respondent does not have a contractual

agreement or general practice providing for the return of that material to the manufacturer (readily confirmed by a written agreement with the manufacturer or business records maintained by the Respondent documenting routine returns of the material to the manufacturer), or the material otherwise cannot be donated, resold, reused, or recycled in a manner that does not constitute discard pursuant to 40 C.F.R. § 261.2 or applicable state law, or which the donation, resale, reuse, or recycling is prohibited under other applicable federal or state law.

- cc. “Stores” means Walmart Discount Stores and Supercenters, or any future such Walmart Retail Facility (but not including Clubs as defined above).
- dd. “United States” means the United States of America, and all of its departments, agencies, and instrumentalities.
- ee. “Walmart Retail Facility” or “Retail Facility” means the Walmart owned retail facilities in the United States (including Puerto Rico and other U.S. territories), which includes Walmart Discount Stores, Supercenters, Neighborhood Markets, Sam’s Clubs, and Marketside Stores or any future such facility. However, Walmart Retail Facility does not include any small format Walmart owned retail facility opened after January 1, 2011, that totals less than 30,000 sq. ft. in retail space. Nothing in this CAFO relieves Respondent from its obligation to comply with all applicable federal, state, and local statutes and regulations for all such small format Walmart owned retail facilities.

VII. STIPULATED FACTS

- 27. Complainant is the Director, Waste and Chemical Enforcement Division, Office of Civil Enforcement, U.S. EPA.
- 28. Respondent is Wal-Mart Stores, Inc. (Walmart). Walmart’s corporate office is located at 702 SW 8th Street, Bentonville, AR 72716-8611. Walmart operates approximately 4000 retail facilities throughout all fifty (50) states in the United States.

VIII. RCRA LEGAL BACKGROUND

29. In 1976, Congress enacted RCRA, amending the Solid Waste Disposal Act, to regulate hazardous waste management. RCRA Subtitle C, 42 U.S.C. §§ 6921 *et seq.*, empowers EPA to identify and list hazardous wastes. It also authorizes EPA to regulate hazardous waste generators, transporters, and the owners and operators of hazardous waste treatment, storage, and disposal facilities. EPA has promulgated regulations to implement RCRA Subtitle C, which are set forth at 40 C.F.R. Parts 260-270, 273, and 279.
30. Pursuant to Section 3001 of RCRA, 42 U.S.C. § 6921, EPA promulgated regulations to define what materials are “solid wastes,” and of these solid wastes, what wastes are regulated as “hazardous wastes.” These regulations and definitions are set forth at 40 C.F.R. Part 261.
31. Pursuant to 40 C.F.R. § 261.2, a “solid waste” is any discarded material that is not otherwise excluded by regulation or variance.
32. Regulations governing the identification of hazardous wastes are found in 40 C.F.R. Part 261. These regulations contain two (2) categories of hazardous wastes, “listed” and “characteristic.” Those wastes that have been determined to be hazardous by definition have been assigned certain identification numbers and are referred to as “listed wastes.” “Characteristic hazardous wastes” are solid wastes that exhibit one or more of the following characteristics: ignitability, reactivity, corrosivity or toxicity.
33. Section 3002 of RCRA, 42 U.S.C. § 6938, requires EPA to establish standards applicable to generators of hazardous wastes. These standards are codified at 40 C.F.R. Part 262 and include requirements for determining whether a waste is hazardous, managing waste in proper containers, labeling and dating containers, inspecting waste storage areas, training, planning for emergencies, and procedures and requirements related to shipping wastes off-site for treatment, storage, or disposal.

IX. FIFRA LEGAL BACKGROUND

34. FIFRA grants the Agency authority to regulate the production, distribution, sale, labeling, and application of pesticides. Pursuant to 7 U.S.C. § 136j(a)(2)(L), no person shall produce any pesticide unless the establishment in which it is produced is registered with EPA under Section 7(a) of FIFRA, 7 U.S.C. § 136e(a). Pursuant to 7 U.S.C. § 136j(a)(1)(E) and (C), respectively, with certain exceptions not applicable to this CAFO, it is unlawful for any person to distribute or sell, *inter alia*: a) any pesticide which is adulterated or misbranded; and b) any registered pesticide the composition of which differs at the time of its distribution or sale from its composition as described in the statement required in connection with its registration under 7 U.S.C. § 136a. It is unlawful for any person to detach, alter, deface, or destroy any labeling required under FIFRA. 7 U.S.C. § 136j(a)(2)(A).

X. EPA ALLEGATIONS AND DETERMINATIONS

35. Respondent, Wal-Mart Stores, Inc. is a “person” as defined in Section 1004(15) of RCRA, 42 U.S.C. § 6903(15), Section 2(s) of FIFRA, 7 U.S.C. § 136(s), and 40 C.F.R. § 260.10;
36. Respondent operates retail grocery and department stores in various formats across the United States at which Walmart sells commonly used consumer products.
37. Respondent sells common consumer products, some of which may be considered hazardous waste (when discarded) under federal or state law, including but not limited to, bleaches, pool chlorine and acids, pesticides, fertilizers, paints and varnishes, lamp oil and other ignitable liquids, aerosol products, oven cleaners and various other cleaning agents, automotive products and solvents, and other flammable and corrosive materials. Most of these consumer products are sold to the public in the ordinary course of business.
38. If these common consumer products are spilled or leaking or in a condition such that they cannot be used for their intended purpose, sold, or recycled, some of these products may be considered hazardous waste under federal or state law. Prior to 2006, some of these hazardous wastes were

then sent by the Retail Facilities to one (1) of six (6) Walmart Return Centers to determine final disposition.

39. Respondent is the owner and operator of approximately 4000 Walmart Retail Facilities and Distribution Centers, of which, on a monthly basis, a very large majority may be Conditionally Exempt Small Quantity Generators ("CESQG") of hazardous waste, pursuant to 40 C.F.R. § 261.5.
40. Prior to 2006, Walmart Retail Facilities that generated more than 100 kg of hazardous waste per month did not systematically determine if Solid Wastes were hazardous waste as required by 40 C.F.R. § 262.11, and where such waste was hazardous, did not systematically handle the hazardous waste in accordance with the requirements of 40 C.F.R. Part 262.
41. Prior to 2006, Respondent did not prepare manifests for shipment of these wastes to the Return Centers.
42. Prior to 2006, some of the returned or damaged products Walmart shipped to its Return Centers on Walmart trucks were hazardous waste. Walmart trucks are not authorized to transport hazardous waste, as defined in 40 C.F.R. Part 263.
43. Walmart's Return Centers are not designated hazardous waste treatment, storage or disposal facilities under RCRA and are not authorized to accept hazardous waste.
- Prior to 2006, Respondent did not have a proper employee training plan in place at the Retail Facilities, as required by 40 C.F.R. Part 262 nor did Respondent have emergency procedures in place.
44. This paragraph intentionally left blank.

45. A majority of the Respondent's Retail Facilities typically generate less than 100 kg of hazardous waste per month, and therefore, are subject only to the RCRA regulatory requirements applicable to Conditionally Exempt Small Quantity Generators ("CESQGs") at 40 C.F.R. § 261.5.
46. Walmart sells, at Wal-Mart Retail Facilities, among other things, a variety of pesticides and fertilizer-pesticide mixtures that are regulated under FIFRA.
47. On October 9, 2006, Walmart entered into a written agreement with an entity that became known as Greenleaf LLC, to receive, re-package and otherwise prepare certain household products, including regulated pesticides for reuse and re-sale.
48. On at least 70 days between, approximately, July 2006 and February 2008, Walmart sent truckloads of household products, including charcoal, kitty litter, and approximately two million pounds of solid and liquid pesticides from Walmart Return Centers destined for and delivered to Greenleaf's facility in Neosho, Missouri ("the Greenleaf facility"). At least nine pesticide products (see Appendix B) were included in the shipments described above. Respondent avers that the shipments to Greenleaf were intended for the purpose of re-packaging and re-sale in order to allow the useable products to be used for their intended purposes, thereby reducing waste.
49. Greenleaf did not, at the time of the violations alleged herein, have appropriate EPA FIFRA registrations, required pursuant to Section 3 of FIFRA, 7 U.S.C. § 136a, to mix, repackage, and relabel some of the pesticides that Walmart sent to the Greenleaf facility.
50. Walmart subsequently removed and disposed of all materials, including pesticides, from the Greenleaf facility under the supervision of the Missouri Department of Natural Resources.
51. In 2006, Respondent began to implement an enhanced environmental management program in all of its Retail Facilities which seeks to provide for the proper management of hazardous wastes

at all Walmart Retail Facilities and in many respects goes beyond mere compliance with environmental laws. This program is more fully described in Paragraph 93 of this CAFO.

52. Under the Respondent's current environmental management program, hazardous waste determinations are made at all Walmart Retail Facilities and hazardous wastes are picked up by licensed hazardous waste haulers and transported under a RCRA hazardous waste manifest to a hazardous waste treatment, storage, or disposal facility.
53. Respondent currently operates all Walmart Retail Facilities generally in compliance with the Small Quantity Generator requirements of 40 C.F.R. Part 262, even if the facility does not generate more than 100 kg of hazardous waste per month.
54. Respondent continues to operate a Reverse Distribution System for products that cannot, for various reasons, be sold in Walmart Retail Facilities. The Parties agree that the use of reverse distribution for the management of retail consumer products (wherein items are centralized for determining the most efficient use, re-use, or other disposition of the item), is an effective means of ensuring re-use, recycling, and waste minimization. The Parties acknowledge that for some Consumer Products sent to Return Centers a decision as to whether those products will be discarded can only be made at the Return Center, as reflected in the terms of this CAFO. This means that Return Centers do generate certain hazardous wastes. This agreement attempts to facilitate the effective use of the reverse distribution process while ensuring that those Consumer Products that clearly constitute hazardous wastes are managed in accordance with RCRA at Walmart's Retail Facilities.

XI. VIOLATIONS

Count 1: Failure to Make a Hazardous Waste Determination

55. Paragraphs 1 through 54 above are incorporated herein by reference as if they were set forth in their entirety.

56. 40 C.F.R. § 262.11 requires a person who generates a Solid Waste to determine if that waste is a hazardous waste.

57. Solid Waste is generated at Walmart Retail Facilities. From January 1, 2005 until January 1, 2006, Respondent, before shipping Solid Wastes to Return Centers, failed to make hazardous waste determinations at any of its Walmart Retail Facilities.

58. By failing to determine whether the Solid Waste generated at Walmart Retail Facilities was a hazardous waste, Respondent violated 40 C.F.R. § 262.11.

Count 2: Failure to Prepare a Hazardous Waste Manifest

59. Paragraphs 1 through 58 above are incorporated herein by reference as if they were set forth in their entirety.

60. 40 C.F.R. § 262.20 requires any generator who generates more than 100 kg of hazardous waste per month and who transports or offers for transport hazardous waste to prepare a manifest.

61. From January 1, 2005 until January 1, 2006, Respondent failed to prepare a manifest for each shipment of hazardous waste requiring such a manifest from Walmart Retail Facilities to its Return Centers.

62. By failing to prepare a manifest for each shipment of hazardous waste requiring such a manifest from Walmart Retail Facilities, Respondent violated 40 C.F.R. § 262.20.

Count 3: Offering Hazardous Waste to Un-permitted Treatment, Storage, or Disposal

Facility

63. Paragraphs 1 through 62 above are incorporated herein by reference as if they were set forth in their entirety.

64. From January 1, 2005 until January 1, 2006, Respondent transported hazardous waste from its Retail Facilities to its Return Centers.

65. From January 1, 2005 until January 1, 2006, the transporter did not have an EPA identification number and the Return Centers were not authorized hazardous waste treatment, storage, or disposal facilities with valid EPA identification numbers.

66. By offering its hazardous waste to transporters and hazardous waste treatment, storage or disposal facilities that did not have valid EPA identification numbers, Respondent violated 40 C.F.R. § 262.12.

Count 4: Failure to Meet Hazardous Waste Handling, Storage, and Emergency Response Requirements

67. Paragraphs 1 through 66 above are incorporated herein by reference as if they were set forth in their entirety.

68. From January 1, 2005 until January 1, 2006, Respondent accumulated hazardous waste at its Retail Facilities in unmarked and undated containers.

69. From January 1, 2005 until January 1, 2006, Walmart Retail Facilities did not comply with the emergency planning procedures and training requirements pursuant to 40 C.F.R. § 262.34(d).

70. By accumulating hazardous waste in unmarked and undated containers and failing to have implemented the required emergency planning procedures and employee training, Respondent did not meet the conditions for an exemption from permit requirements under 40 C.F.R. § 262.34. Therefore, Respondent failed to qualify for an exemption from the permit requirements and violated RCRA § 3005(a) and 40 C.F.R. § 270.1 by storing containers of hazardous wastes without a permit to store such waste, or interim status.

Count 5: Detachment and/or alteration of pesticide labels in violation of FIFRA Section

12(a)(2)(A)

71. Paragraphs 1 through 70 above are incorporated herein by reference as if they were set forth in their entirety.

72. Section 12(a)(2)(A) of FIFRA, 7 U.S.C. § 136j(a)(2)(A), provides that it shall be unlawful for any person to detach, alter, deface, or destroy, in whole or in part, any labeling required under FIFRA.

73. Respondent repackaged or otherwise changed the FIFRA-required labeling of at least two pesticide products, which were handled at its Return Centers and shipped to or destined for the Greenleaf facility on each of at least 70 days between July 1, 2006 and January 30, 2008, as alleged in paragraph 48 above.

74. As a result of damage to certain containers and Respondent's changes to the packaging or labeling of pesticide products as alleged in paragraph 73, the labeling, required under FIFRA and 40 C.F.R. § 156.10(a), on one or more containers of at least two pesticides, which were shipped to or destined for the Greenleaf facility in Neosho, Missouri from Respondent's Return Centers on each of at least 70 days between July 1, 2006 and January 30, 2008, was, in whole or in part, detached, altered, or obscured by opaque outer wrappers or containers that Respondent placed over some of the damaged containers.

75. By covering, detaching, altering, or otherwise changing, in whole or in part, the labeling on the containers of at least two pesticide products, which were shipped to or destined for the Greenleaf facility from Respondent's Return Centers on each of at least 70 days between July 1, 2006 and January 30, 2008, as alleged in paragraphs 73 and 74, above, Respondent violated Section 12(a)(2)(A) of FIFRA, for which penalties may be assessed pursuant to Section 14(a) of FIFRA, 7 U.S.C. § 136l(a).

Count 6: Distribution of misbranded pesticidal products in violation of Section 12(a)(1)(E) of FIFRA

76. Paragraphs 1 through 75 above are incorporated herein by reference as if they were set forth in their entirety.

77. Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), provides that it shall be unlawful for any person in any State to distribute or sell to any person any pesticide that is adulterated or misbranded.
78. Pursuant to Section 2(q)(1)(E) of FIFRA, 7 U.S.C. § 136(q)(1)(E), a pesticide is “misbranded” if, *inter alia*, any word, statement, or other information required by or under authority of FIFRA to appear on the label or labeling is not prominently placed thereon with such conspicuousness and in such terms as to render it likely to be read and understood by the ordinary individual under customary conditions of purchase and use.
79. Section 2(q)(2)(A) of FIFRA, 7 U.S.C. § 136(q)(2)(A), provides, in relevant part, a pesticide is “misbranded” if, *inter alia*, the label does not bear an ingredient statement on that part of the immediate container (and on the outside container or wrapper of the retail package, if there be one, through which the ingredient statement on the immediate container cannot be clearly read), which is presented or displayed under customary conditions of purchase.
80. Section 2(q)(2)(C) of FIFRA, 7 U.S.C. § 136(q)(2)(C), provides, in relevant part, a pesticide is “misbranded” if, *inter alia*, there is not affixed to its container, and to the outside container or wrapper of the retail package, if there be one, through which the required information on the immediate container cannot be clearly read, a label bearing the information enumerated in that paragraph.
81. Pursuant to 40 C.F.R. § 156.10(a)(1), pesticide products must bear labels containing the information specified by FIFRA and its implementing regulations. The contents of the label must show clearly and prominently, *inter alia*, the name, brand, or trademark under which the product is sold; the name and address of the producer, registrant, or person for whom produced; the net contents expressed in the units specified in 40 C.F.R. § 156.10(d); the product registration number; the pesticide producing establishment number; the ingredient statement (with the active ingredients identified by name and designated as “active ingredients” with their total percentage

by weight identified and inert ingredients designated collectively as “inert ingredients” with their total percentage by weight identified); a hazard and precautionary statement; directions for use of the pesticide; and use classification. The label must appear on or be securely attached to the immediate container of the pesticide product. 40 C.F.R. § 156.10(a)(4)(i).

82. As a result of damage to certain containers, and Respondent’s changes to the packaging or labeling of pesticide products as alleged in paragraph 73, above, the labels on one or more containers of each of at least two pesticide products, which were shipped to or destined for the Greenleaf facility from Respondent’s Return Centers on each of at least 70 days between July 1, 2006 and January 30, 2008, as alleged in paragraph 48, above, did not clearly display all of the information required by FIFRA and 40 C.F.R. § 156.10(a) or such labels could not be read because they were obscured by opaque outer wrappers or containers.
83. Section 2(q)(1)(A) of FIFRA, 7 U.S.C. § 136(q)(1)(A), provides that a pesticide is “misbranded” if its labeling bears any statement, design or graphic representation relative thereto or to its ingredients which is false or misleading in any particular.
84. Some of the containers of pesticides or pesticide products that Respondent shipped to Greenleaf’s facility in Neosho, Missouri on at least 70 occasions between January 1, 2007 and January 30, 2008, as alleged in paragraph 48, above, contained quantities of pesticides that differed significantly from the quantities listed on the container labels.
85. For the reasons described in paragraphs 82 and 84, above, one or more containers of each of at least two pesticide products, which were shipped to or destined for the Greenleaf facility from Respondent’s Return Centers on each of at least 70 days between July 1, 2006 and January 30, 2008, were “misbranded” as that term is defined in FIFRA § 2(q)(1)(A) and (E) and 2(q)(2)(A) and (C).
86. Respondent’s distributions of at least two misbranded pesticides on at least 70 days between July 1, 2006 and January 30, 2008, as alleged in paragraphs 48, 82, and 84, above, were unlawful acts

under Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), for which a penalty may be assessed pursuant to Section 14(a) of FIFRA.

XII. RCRA COMPLIANCE AGREEMENT

Based on the foregoing Preliminary Statements, Allegations and Determinations, the Parties agree to the following:

87. Although a majority of Walmart Retail Facilities may qualify as CESQGs in any given month (pursuant to 40 C.F.R. § 261.5), the hazardous waste management program implemented by Respondent at Walmart Retail Facilities, as referenced in Paragraphs 87-95, generally seeks to satisfy RCRA Small Quantity Generator requirements. To the extent Consumer Products continue to be subject to RCRA hazardous waste requirements when discarded, Walmart agrees to:

- a. As applicable, Respondent shall ensure that all Walmart Retail Facilities have an EPA identification number, pursuant to 40 C.F.R. § 262.12.
- b. At all Walmart Retail Facilities, Respondent will properly segregate and store all hazardous wastes for no more than 180 days (270 days if the waste must be shipped more than 200 miles to a treatment, storage, or disposal facility) and comply with all other requirements applicable to Small Quantity Generators at 40 C.F.R. § 262.34.
- c. Respondent shall properly package, label, mark, and placard all hazardous waste shipments from Walmart Retail Facilities pursuant to 40 C.F.R. §§ 262.30 – 262.33.
- d. Respondent shall comply with all manifest and related requirements for hazardous wastes shipped from Walmart Retail Facilities pursuant to 40 C.F.R. §§ 262.20 – 262.27.
- e. Respondent shall only use transporters that have an EPA identification number to transport hazardous wastes from Walmart Retail Facilities.
- f. Respondent shall send all hazardous wastes generated at Walmart Retail Facilities to treatment, storage, or disposal facilities that have an EPA identification number.

g. Respondent shall maintain required records and submit required reports pursuant to 40

C.F.R. §§ 262.40 – 262.44.

88. If at any time a Walmart Retail Facility generates 1000 kg or more of hazardous waste in a calendar month or accumulates more than 6000 kg of hazardous waste, Respondent shall comply with all Large Quantity Generator requirements in 40 C.F.R. Part 262 with respect to that Walmart Retail Facility.
89. Respondent shall manage all hazardous wastes generated at Walmart Retail Facilities (as determined pursuant to Paragraph 91) as hazardous waste and will not send hazardous waste to its Distribution and Return Centers.
90. Respondent shall submit to EPA within sixty (60) days of the filing of this CAFO a current list of all Consumer Products that Respondent currently manages as hazardous waste at its Retail Facilities if those products are spilled, leaking, and cannot be used for their intended purpose in Walmart Retail Facilities (“RCRA Hazardous Item List”). This list shall be marked as and considered Confidential Business Information.
91. Respondent shall make hazardous waste determinations for all Solid Wastes, pursuant to 40 C.F.R. § 262.11. As a means of compliance with this requirement and for purposes of this CAFO only, Respondent shall implement a program to continuously monitor the management of hazardous waste at Walmart Retail Facilities. This program will address Consumer Product items sent to the Return Centers in quantities greater than 1000 items (by Walmart Item ID number), on an annual and nationwide basis. If this program identifies Consumer Product(s) managed as a hazardous waste more than 85% of the time at all Return Centers in the previous calendar year and Walmart has not identified an alternative method of management for those products, then those products will be managed as hazardous wastes at the Retail Facilities pursuant to this CAFO only. Respondent shall submit to EPA on January 31, 2014, and annually thereafter for the duration of this CAFO, a description of all products that as a result of this

review, Respondent will manage as hazardous waste in accordance with this CAFO. Respondent shall submit this report on January 31 of each calendar year for as long as this CAFO is in effect, with a reference to the RCRA docket number for this agreement, to the following person:

Rosemarie A. Kelley
Director, Waste and Chemical Enforcement Division
U.S. Environmental Protection Agency
1200 Pennsylvania Ave, N.W. (MC 2249A)
Washington, DC 20460

92. At each Retail Facility, Respondent shall maintain a current database of all Consumer Products that should be managed as hazardous waste pursuant to this agreement and shall make the information available to any EPA or State official conducting a RCRA compliance inspection at that Retail Facility. This database shall be the same or similar as the handheld terminal-type system described in Paragraph 93(a).
93. As of the date of filing of this CAFO, Walmart has already taken steps to improve its environmental compliance program to address the allegations in this CAFO and to ensure compliance with all applicable environmental laws related to Walmart's Reverse Distribution Processes and hazardous waste management. Generally, these steps include an improved hazardous waste management system at Walmart Retail Facilities, development of enhanced hazardous waste training programs for Walmart Retail Facility Associates, and the development of various standardized operating procedures. Specifically, Walmart agrees to the following programs that have been implemented in response to the allegations of the United States:
- a. Implementation of Improved Hazardous Waste Management System at Retail Facilities.
- Walmart has engaged a third-party consultant to review the Consumer Products to be sold at a Retail Facility and determine if those products, if discarded by Walmart, would be considered hazardous waste pursuant to RCRA ("RCRA Items"). Once the RCRA Items are identified, either through the third-party consultant or by the supplier(s) of the RCRA Item, that information is then loaded into the Retail Facilities' handheld terminal (or

equivalent) and the RCRA Items are identified as being potentially flammable, toxic/corrosive, reactive, or listed pursuant to RCRA, in the Retail Facilities' handheld terminal and on the product's shelf label (each category designated by color). To the extent these RCRA Items become a waste (as the result of spills or damage at the Retail Facility), Walmart has implemented a system that conforms with the provisions of RCRA – commonly and currently known as the “bucket system.” The bucket system provides training and color-coded buckets for the management of items that become hazardous waste at the Retail Facility. At Retail Facilities, Walmart will continue operation of its “RCRA item file” and “bucket system” (or equivalent file or systems) to ensure proper management of RCRA Items once they become Solid Waste during the term of this CAFO, to the extent the law continues to identify these items as subject to the hazardous waste requirements of RCRA.

- b. Development and Implementation of Enhanced Hazardous Waste Training at Retail Facilities. Walmart has developed and implemented hazardous waste management and hazardous waste and spill cleanup training, as well as hazard communication training, that is provided to all Retail Facility Associates within sixty (60) days of hire and on an annual basis.
- c. Development of Standard Operating Procedures Relating to Environmental Compliance. In order to assist its Retail Facilities in the management of various types of hazardous and universal waste, Walmart has developed and implemented standard operating procedures for use by Retail Facility Associates. These standard operating procedures are available and accessible to Retail Facility Associates through Walmart's intranet system. Appendix A contains the current list of hazardous material and hazardous waste related standard operating procedures implemented at the Stores and Clubs.

- d. Corporate Compliance Structure. In addition to existing Walmart personnel with environmental compliance responsibilities within a particular home office department, Walmart has created a home office vice president position responsible for environmental compliance. Walmart has, when needed, increased the staffing resources of the Vice President of Environmental Compliance in order to oversee proper implementation of the above programs.

94. In addition to requiring continued operation of its hazardous waste management programs, a purpose of this CAFO is to require Walmart to implement an Environmental Management System (EMS) in all of its Retail Facilities located in the United States. This EMS will not only advance compliance with environmental regulatory requirements, including Walmart's management of hazardous materials and hazardous waste and reduction of waste generated from its Retail Facilities, but will also achieve enhanced compliance at Return Centers, and Distribution Centers. To that end, Walmart has agreed to implement enhanced EMS procedures. These enhanced procedures, detailed further in Appendix A, include the following:

- a. Reorganization of Walmart's Home Office Environmental Compliance Organization. In order to provide increased resources and support structure to Walmart Retail Facilities, Walmart will reorganize its Home Office Environmental Compliance organization in order to ensure a uniform reporting structure under the Vice President of Environmental Health and Safety Compliance. The net effect of the reorganization will be a more uniform environmental command structure and improved environmental communications, resulting in a more robust organization available to address environmental compliance issues.
- b. Addition of Resources Outside of Home Office for Stores. Walmart will implement resources outside of Home Office to assist Stores in compliance with hazardous waste and hazardous materials laws and regulations. These resources will be responsible for

executing, training, and overseeing the company's hazardous waste and hazardous materials policies at the store, market, and regional level of the Stores' business operations.

- c. Job Descriptions. In order to improve accountability, Walmart will add an explicit environmental compliance requirement to certain Walmart Retail Facility staff personnel job descriptions.
- d. Claims Supervisor for Stores. Walmart will assign a new claims supervisor (Claims Supervisor) position at each Store whose job responsibilities will include responsibility and accountability for hazardous waste management issues.
- e. Club-Level Manager for Sam's Clubs. Walmart will also create a new Manager position at each Club whose job responsibilities will include responsibility and accountability for hazardous waste management issues.
- f. Advanced Training for Certain Retail Associates. Walmart will develop and implement additional/advanced training requirements for Store Claims Supervisors and Club Compliance Managers.
- g. Tracking of Environmental Training at Stores and Clubs. Walmart will implement an improved information technology system to enable tracking of Core Environmental Training (as described in Paragraph 93(b) and Appendix A) and the Advanced Training for Certain Retail Associates (as described in Paragraph 94(f) and Appendix A) by the Home Office Environmental Compliance Organization.
- h. Environmental Compliance Information Systems. Walmart will contract with an independent third party (or use in-house resources) to develop environmental compliance information systems to be used to track environmental obligations at Retail Facilities.
- i. Development and Implementation of Return Center Hazardous Waste EMS and Distribution Center Hazardous Waste EMS. Walmart will contract with a third-party

environmental compliance consultant for the development and implementation of a Return Center specific Hazardous Waste EMS. In addition, Walmart will contract with a third-party environmental compliance consultant for the development and implementation of a Distribution Center specific Hazardous Waste EMS.

95. Walmart will perform the EMS procedures as set forth in Paragraph 94 in accordance with the specifications and schedules set forth in Appendix A.

96. Respondent shall certify compliance to EPA with the appropriate documentation to certify that Respondent is complying with the requirements set forth in Paragraphs 87-95 above, within ninety (90) calendar days of the schedule provided for completion in Appendix A. The certification and supporting documentation should be provided to:

KC Schefski, Associate Director
Waste and Chemical Enforcement Division
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., N.W. (2249A)
Washington, DC 20460

97. Respondents shall be liable for stipulated penalties to the EPA, as specified below, for failure to comply with the requirements of this CAFO, unless excused by EPA in its sole discretion. Compliance by Respondent shall include the timely completion and submittal of all plans and reports required by this agreement or any subsequent modification. Respondent shall pay stipulated penalties in the following amounts for the following obligations in the amounts set forth below:

- a. for failure to timely submit reports, plans, notifications, or other submittals required in this CAFO or its Appendices;
- b. for failure to timely meet any deadlines set forth in the Resources, Systems, and Accountability Work Plan to be submitted pursuant to Appendix A;

In the Matter of Wal-Mart Stores, Inc: RCRA HQ 2013-4001; FIFRA HQ 2013-5056

- c. for failure to develop a Retail Facility Associate training program that requires that Retail Facility Associates are trained on Walmart's hazardous waste management policies as provided in Paragraphs 4(a) and (b) of Appendix A;
- d. for failure to timely implement the standard operating procedure for store-level hazardous waste management as provided by Paragraph 6 of Appendix A; or
- e. for failure to select and retain an independent third party to develop a Return Center specific Hazardous Waste Environmental Management System as provided by Paragraphs 8-9 of Appendix A.
- f. for failure to select and retain an independent third party to develop a Distribution Center specific Hazardous Waste Environmental Management System as provided by Paragraphs 10-11 of Appendix A.

Period of Failure to Comply	Penalty Per Violation Per Day
1st through 7th day	\$100.00
8th through 21st day	\$250.00
22nd through 30th day	\$500.00
Greater than 30 days	\$1,000

98. Respondent's failure to timely comply with any requirement of this CAFO may subject

Respondent to a civil action pursuant to Section 3008(c) of RCRA, 42 U.S.C. § 6928(c), to collect penalties for noncompliance with this CAFO.

99. Payment of stipulated penalties will not alter in any way Walmart's obligation to comply with the requirements of this CAFO.

100. Nothing in this CAFO relieves Respondent from its obligation to comply with all applicable federal, state, and local statutes and regulations, including Subtitle C requirements at 40 C.F.R. Parts 260 through 279, and authorized state programs, at all its facilities.

101. Nothing in this CAFO will require Respondent to meet more stringent requirements contained in this CAFO in the event that the applicable law becomes less stringent. Within 60 days of Walmart providing notice to EPA that applicable requirements have been modified by issuance of any new EPA final regulation (as promulgated in the Federal Register); policy or guidance governing hazardous waste management; upon EPA approval or promulgation of new or revised waste management standards; or upon the issuance of a permit that contains new requirements pertaining to Walmart's operations, Walmart may conform its practices to the less stringent obligations contained in the applicable new regulation, policy, new or revised standard or permit.

XIII. PAYMENT OF CIVIL PENALTY

102. Respondent agrees to pay a civil penalty in the sum of \$6,116,000 within thirty (30) calendar days of the effective date of this CAFO to resolve the RCRA violations alleged herein.

103. Respondent agrees to pay a civil penalty in the sum of \$1,512,000 within thirty (30) calendar days of the effective date of this CAFO to resolve the FIFRA violations alleged herein.

104. The parties agree that the payment of the civil penalties specified in Paragraphs 102-103 resolves the civil penalty liability for the violations alleged herein.

105. Payment shall be made by cashier's check, certified check, or other payment acceptable to EPA, payable to: **Treasurer, United States of America**. EPA's Employer ID Number is 52-0852695.

The facility name and the docket number for this matter shall be referenced on the face of the check. Payment shall be tendered via the U.S. Postal Service to:

United States Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, Missouri 63197-9000

Respondent shall submit a copy of the payment to the following addresses:

U.S. Environmental Protection Agency
Clerk of the Board
Environmental Appeals Board

Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460-0001

Ann Stephanos, Attorney-Adviser
Office of Civil Enforcement
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., N.W. (MC 2249A)
Washington, DC 20460

Alternatively, Respondent shall pay by wire transfer with a notation of “Wal-Mart Stores, Inc,
Civil Penalty Docket Nos. RCRA-HQ-2013-4001, FIFRA-HQ-2013-, using the following
information:

Federal Reserve Bank of New York
ABA Routing Number: 021030004
Account Number: 68010727
SWIFT address: FRNYUS33
33 Liberty Street
New York, NY 10045
Field Tag 4200 of the Fedwire message should read: “D 6810727 Environmental
Protection Agency”

106. If Respondent fails to remit the civil penalty as agreed to herein, EPA is required to assess interest and penalties on debts owed to the United States and a charge to cover the costs of processing and handling the delinquent claim. Interest, at the statutory judgment rate provided for in 31 U.S.C. § 3717, will therefore begin to accrue on the civil penalty if not paid within thirty (30) calendar days after the effective date of this CAFO. Pursuant to 31 U.S.C. § 3717, Respondent must pay the following amounts on any amount overdue:
- (a) Interest. Any unpaid portion of a civil penalty must bear interest at the rate established by the Secretary of the Treasury pursuant to 31 U.S.C. § 3717(a)(1). Interest will therefore begin to accrue on a civil penalty or stipulated penalty if it is not paid by the last date required. Interest will be assessed at the rate of the United States Treasury tax and loan rate in accordance with 4 C.F.R. § 102.13(c).

- (b) Monthly Handling Charge. Respondent must pay a late payment handling charge of \$15.00 on any late payment, with an additional charge of \$15.00 for each subsequent thirty (30) calendar day period over which an unpaid balance remains.
- (c) Non-payment Penalty. On any portion of a civil penalty more than ninety (90) calendar days past due, Respondent must pay a non-payment penalty of six percent per annum, which will accrue from the date the penalty payment became due and is not paid. This non-payment is in addition to charges which accrue or may accrue under subparagraphs (a) and (b). Penalties paid pursuant to this CAFO are not deductible for federal purposes under 28 U.S.C. § 162(f).

107. Each Party will pay its own costs and attorneys' fees.

XIV. RESERVATION OF RIGHTS AND RELEASE

108. Notwithstanding any other provision of this CAFO, an enforcement action may be brought pursuant to Section 7003 of RCRA, 42 U.S.C. § 6973, or other applicable statutory authority, to address conditions that may present an imminent and substantial endangerment to human health or the environment.
109. Except as provided in Paragraph 111, Complainant reserves the right to take enforcement action against Respondent to enforce the terms and conditions of this CAFO.
110. Except as expressly provided herein, nothing in this CAFO shall constitute or be construed as a release from any civil or criminal claim, cause of action or demand in law or equity for any liability Respondent may have arising out of, or relating in any way to, the release of any hazardous constituents, hazardous substances, hazardous wastes, pollutants, or contaminants found at, taken to, or taken from its facilities.
111. Subject to the conditions in paragraph 112, EPA agrees not to sue or take administrative action against Walmart pursuant to RCRA and FIFRA for civil violations or alleged civil violations of the conditions, limitations and requirements of RCRA and FIFRA based on the following categories of violations committed prior to the execution of this Consent Agreement:

In the Matter of Wal-Mart Stores, Inc: RCRA HQ 2013-4001; FIFRA HQ 2013-5056

- a. any alleged violation of RCRA generator, transporter, or treatment, storage, or disposal facility requirements for the management of hazardous waste at Walmart Retail Facilities and the transportation of hazardous waste from Walmart Retail Facilities and Distribution Centers to Walmart Return Centers; and
- b. any alleged violation involving the transportation, management, and disposal of FIFRA-regulated products shipped from any Return Center to Greenleaf.

112. EPA's agreement not to sue or take administrative action against Walmart as described in paragraph 111 is conditional upon the accuracy of Respondent's representations to EPA related to the EPA Allegations and Determinations set forth in Section X of this CAFO, including the following:

- a. That, outside of California and Missouri, on average fewer than 300 of its stores episodically generated more than 100 kg of potentially RCRA "hazardous waste" in any given month during the time period of the alleged violations;
- b. that unmanifested hazardous waste as part of the Reverse Distribution Process shipped from Walmart's Retail Facilities were not sent to destinations other than Walmart Distribution Centers, Walmart Return Centers, or Greenleaf;
- c. that all pesticides shipped by Walmart to Greenleaf have since been removed from Greenleaf's facilities and disposed of in accordance with all applicable laws; and

113. Unless specifically allowed under the terms of this CAFO, this CAFO may be amended or modified only by written agreement executed by both the EPA and Respondent.

114. Walmart may alter the organizational requirements or implementation structure described in this Consent Agreement, Appendix A and any Work Plan in response to future business needs. In the event that any of the positions outlined in this Consent Agreement, Appendix A or any Work Plan cease to exist in the Walmart organization or are otherwise substantially modified, the responsibilities of the position eliminated will be added to the responsibilities of the remaining

positions or to those of an equivalent position under a new title or to a third party. Within 30 Days after a significant change has taken effect, Walmart will send EPA notice of the reorganization and the title and general job description of the person(s) to whom the responsibilities have been given.

XV. DISPUTE RESOLUTION

115. The dispute resolution procedures of this Section shall be the exclusive mechanism to resolve disputes arising under or with respect to this CAFO.

116. If Respondent disagrees, in whole or in part, with any decision by EPA under this CAFO, Respondent shall notify EPA through the Chief of the Waste Enforcement Branch, and the Parties shall use their best efforts to informally and in good faith resolve all disputes or differences of opinion relating to this CAFO.

117. In the event that the Parties cannot resolve a dispute by informal negotiations under the preceding paragraph, Respondent may pursue the matter by submitting its objection to the Chief of the Waste Enforcement Branch of EPA in writing. Respondent's written objections must set forth the specific points of the dispute, the basis for Respondent's position and any matters which it considers necessary for EPA's determination.

118. EPA and Respondent shall have thirty (30) days from receipt of Respondent's written objections to attempt to resolve the dispute through formal discussions.

119. Within sixty (60) days of EPA's receipt of Respondent's written objections, EPA, through the Chief of the Waste Enforcement Branch of EPA, will provide to Respondent in writing EPA's decision on the pending dispute.

120. If the Respondent disagrees with the written decision, the Respondent may, within thirty (30) days of receipt of the written decision, appeal to the Director, Waste and Chemical Enforcement Division. Respondent's appeal must set forth the specific points of the dispute, the basis for Respondent's position and any matters which it considers necessary for EPA's determination.

Within thirty (30) days of receipt of the appeal, the Director, Waste and Chemical Enforcement Division will issue a written decision.

121. If Respondent disagrees with the written decision of the Director, Waste and Chemical Enforcement Division, within sixty (60) days of receipt of the Director's decision, Respondent may file an appeal of that decision with the Environmental Appeals Board ("EAB").
122. The Parties may, by mutual written agreement, extend any of the time periods provided for in the dispute resolution process.

XVI. FORCE MAJEURE

123. A "Force Majeure event" is any event beyond the control of Walmart, its contractors, or any entity controlled by Walmart that delays the performance of any obligation under this CAFO despite Walmart's reasonable efforts to fulfill the obligation. "Reasonable efforts" includes anticipating any potential Force Majeure event and addressing the effects of any such event: (1) as it is occurring, and (2) after it has occurred, such that the delay is minimized to the greatest extent reasonably possible.
124. Walmart agrees to notify the United States by written notice as soon as possible, but not later than 72 hours after the time Walmart first knew of any event which might constitute a Force Majeure event. The written notice Walmart submits pursuant to this Paragraph will indicate whether Walmart claims that the delay should be excused due to a Force Majeure event. The notice will describe the basis for Walmart's contention that it experienced a Force Majeure delay, the anticipated length of the delay, the cause or causes of the delay, the measures taken or to be taken to prevent or minimize the delay, and the timetable by which those measures will be implemented. Walmart agrees to adopt all reasonable measures to avoid or minimize such delay.
125. If the United States finds that a delay in performance is, or was, caused by a Force Majeure event, the United States agrees to extend the time for performance, in writing, for a period to compensate for the delay resulting from such event, and stipulated penalties will not be due for

such a period. In proceedings on any dispute regarding a delay in performance, Walmart will have the burden of proving, by a preponderance of the evidence, that the delay is, or was, caused by a Force Majeure event and that the amount of additional time requested is necessary to compensate for that event.

126. An extension of one compliance date based on a particular event will not automatically extend any other compliance date. Walmart will make an individual showing of proof regarding the cause of each delayed incremental step or other requirement for which an extension is sought.

XVII. OTHER APPLICABLE LAWS

127. All actions required to be taken pursuant to this CAFO shall be undertaken in accordance with the requirements of all applicable local, state, and Federal laws and regulations. Respondent shall obtain or cause its representatives to obtain all permits and approvals necessary under such laws and regulations.

XVIII. PARTIES BOUND

128. This CAFO shall be binding upon Respondent and its successors and assigns. Respondent shall cause its officers, directors, employees, agents, and all persons, including independent contractors and consultants acting under or for Respondent, to comply with the provisions hereof in connection with any activity subject to this CAFO.
129. No change in ownership, partnership, corporate, or legal status relating to the facility will in any way alter Respondent's obligations and responsibilities under this CAFO.
130. The undersigned representative of Respondent hereby certifies that he is fully authorized to enter into this CAFO and to execute and legally bind Respondent to this CAFO.

XIX. SEVERABILITY

131. It is the intent of the parties that the provisions of this CAFO are severable. If any provision or authority of this CAFO or the application of this CAFO to any party or circumstances is held by any judicial or administrative authority to be invalid or unenforceable, the application of such

provisions to other parties or circumstances and the remainder of the CAFO shall remain in force and shall not be affected thereby.

XX. EFFECTIVE DATE

132. This CAFO is effective upon the filing of the Final Order. 40 C.F.R. § 22.31(b).

133. The terms of this Consent Agreement will be effective for a period of five (5) years from the filing of the Final Order. After five (5) years from the effective date, this Consent Agreement terminates, provided Walmart has complied with the payment requirements set forth in Section XIII. This Consent Agreement may also be terminated at an earlier date upon agreement of Walmart and the EPA.

AGREED AND CONSENTED TO:

FOR COMPLAINANT:

[REDACTED]

Rosemarie A. Kelley, Director
Waste and Chemical Enforcement Division
Office of Civil Enforcement
Office of Enforcement and Compliance Assurance
United States Environmental Protection Agency

Date: 5/14/13

[REDACTED]

Kenneth C. Schefski, Associate Director (Counsel for Complainant)
Waste and Chemical Enforcement Division
Office of Civil Enforcement
Office of Enforcement and Compliance Assurance
United States Environmental Protection Agency

Date: 5/14/2013

FOR RESPONDENT:

[Redacted]

Phyllis Harris
Wal-Mart Stores, Inc.
Senior Vice President,
Chief Compliance Officer
Wal-Mart Stores, Inc.

Date: 4/03/2013

[Redacted]

Raymond B. Ludwiszewski
Gibson, Dunn & Crutcher LLP
Washington Square
1050 Connecticut Ave NW
Washington, DC 20036

Date: 4/4/13

Attorney for Wal-Mart Stores, Inc.

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Message

From: Fogarty, Johnpc [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=8546B387C687410D88EEEE387DADDF56-JFOGAR02]
Sent: 10/17/2016 10:00:44 PM
To: Welles, Laura [Welles.Laura@epa.gov]
Subject: RE: Whole Foods - draft CAFO

Ok, thank you, and agree we should definitely confirm status.

On my (belated) to-do list is to your comments on the 3rd party audit.

Ex. 5 AC/AWP/DP

Ex. 5 AC/AWP/DP

From: Welles, Laura
Sent: Monday, October 17, 2016 5:49 PM
To: Fogarty, Johnpc <Fogarty.Johnpc@epa.gov>
Subject: Whole Foods - draft CAFO

I'm in the process of incorporating your edits, etc. into the draft CAFO.

With regard to your questions/comments in the draft CAFO about all Whole Foods Markets being CESQGs, I think you're right – WF indicated to us during the first meeting that their stores = CESQGs. I want to confirm with them again. I did an ECHO search – of the WF stores listed (only about one or two dozen were listed), most were CESQS (or there was no RCRA info) except this Chicago store was SQG – <https://echo.epa.gov/detailed-facility-report?fid=110005966598>. I don't fully trust the data in ECHO, but thought it was worth following up with WF.

Laura

Laura Welles
Attorney Advisor
Waste and Chemical Enforcement Division
Office of Civil Enforcement
U.S. Environmental Protection Agency
(202) 564-2754

Message

From: Fogarty, Johnpc [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=8546B387C687410D88EEEE387DADDF56-JFOGAR02]
Sent: 11/10/2016 5:56:00 PM
To: Shinkman, Susan [Shinkman.Susan@epa.gov]
CC: Kelley, Rosemarie [Kelley.Rosemarie@epa.gov]; Welles, Laura [Welles.Laura@epa.gov]
Subject: RE: WholeFoods - penalty/SEP issue

Yes, thanks.

Ex. 5 AC/AWP/DP

From: Shinkman, Susan
Sent: Thursday, November 10, 2016 12:53 PM
To: Fogarty, Johnpc <Fogarty.Johnpc@epa.gov>
Cc: Kelley, Rosemarie <Kelley.Rosemarie@epa.gov>; Welles, Laura <Welles.Laura@epa.gov>
Subject: RE: WholeFoods - penalty/SEP issue

Ex. 5 AC/AWP/DP

This is lightning speed!

From: Fogarty, Johnpc
Sent: Thursday, November 10, 2016 12:19 PM
To: Shinkman, Susan <Shinkman.Susan@epa.gov>
Cc: Kelley, Rosemarie <Kelley.Rosemarie@epa.gov>; Welles, Laura <Welles.Laura@epa.gov>
Subject: WholeFoods - penalty/SEP issue

Apologies in advance for the long-ish email, but I want to be comprehensive in laying this out. We are beginning to discuss penalty and SEP issues in the WholeFoods case – although we are not yet done with the injunctive relief package, in order to expedite settlement with WF we are working on multiple fronts at once. Would like to discuss this with you, and then followup with Cynthia and Larry.

Ex. 5 AC/AWP/DP

Ex. 5 AC/AWP/DP

Ex. 5 AC/AWP/DP

Would like to discuss this idea with you, and then with Cynthia and Larry shortly, as soon as possible, as we would like to start to get to specifics with WF sooner rather than later, in order to meet our hope to have a completed settlement as quickly as possible. Thanks.

Message

From: Fogarty, Johnpc [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=8546B387C687410D88EEEE387DADDF56-JFOGAR02]
Sent: 11/10/2016 7:24:56 PM
To: Welles, Laura [Welles.Laura@epa.gov]
Subject: RE: WF audit - draft #1

As my contracts prof used to say, "boilerplate is ok."

-----Original Message-----

From: Welles, Laura
Sent: Thursday, November 10, 2016 2:08 PM
To: Fogarty, Johnpc <Fogarty.Johnpc@epa.gov>
Subject: RE: WF audit - draft #1

Sounds good. Attached is the proposed final order -- I just used the boiler plate language from the template on the EAB website...

The certificate of service will need to be adjusted accordingly.

-----Original Message-----

From: Fogarty, Johnpc
Sent: Thursday, November 10, 2016 1:47 PM
To: Welles, Laura <Welles.Laura@epa.gov>
Subject: RE: WF audit - draft #1

Thx. Ex. 5 AC/AWP/DP
Ex. 5 AC/AWP/DP I think the SEP administration/oversight is going to be a bit on the high side.

-----Original Message-----

From: Welles, Laura
Sent: Thursday, November 10, 2016 1:34 PM
To: Fogarty, Johnpc <Fogarty.Johnpc@epa.gov>
Subject: RE: WF audit - draft #1

See attached -- minor suggested changes.

Ex. 5 AC/AWP/DP

-----Original Message-----

From: Fogarty, Johnpc
Sent: Friday, November 04, 2016 5:01 PM
To: Welles, Laura <Welles.Laura@epa.gov>
Subject: WF audit - draft #1

Draft CAFO language and a revised explanation/description.

Ex. 5 AC/AWP/DP

Ex. 5 AC/AWP/DP The CAFO provisions is set up as an appendix, to make drafting that part easier (the placeholder in the main body can just refer to it). This is a first cut, but would appreciate your feedback. Thx!

Message

From: Fogarty, Johnpc [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=8546B387C687410D88EEEE387DADDF56-JFOGAR02]
Sent: 10/19/2016 6:27:55 PM
To: Welles, Laura [Welles.Laura@epa.gov]
Subject: RE: Draft (10/18/16) CAFO re: EPA/WFM

Remind me after the call to show you how to convert a word document directly to a PDF.

From: Welles, Laura
Sent: Wednesday, October 19, 2016 2:24 PM
To: Jennifer Hartman King <JHartmanKing@KIngWilliamsLaw.com>; John Hempfling (CE CEN) <John.Hempfling@wholefoods.com>
Cc: Fogarty, Johnpc <Fogarty.Johnpc@epa.gov>
Subject: Draft (10/18/16) CAFO re: EPA/WFM

Jenn and John:

Attached please find a rough draft of the CAFO. John Fogarty and I want to emphasize that this is rough draft and there are still sections that need to be further refined. In the interest of moving our discussion forward, we wanted to get this draft CAFO to you in time for our call this afternoon at 3:00 pm EST. We realize that you will have very little time (less than an hour) to review and so we want to point you to Section IX (page 14 - Compliance Agreement) of the CAFO. We would like to discuss this section, specifically paragraphs 59 through 63 of the CAFO during our call today.

Please let me know if you have any problems with the attachment. I had some problems scanning the document and so the pages are a bit off-centered.

Talk to you soon.

Laura

Laura Welles
Attorney Advisor
Waste and Chemical Enforcement Division
Office of Civil Enforcement
U.S. Environmental Protection Agency
(202) 564-2754

Message

From: Fogarty, Johnpc [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=8546B387C687410D88EEEE387DADDF56-JFOGAR02]
Sent: 10/6/2016 9:53:28 PM
To: Welles, Laura [Welles.Laura@epa.gov]
Subject: RE: Straw outline for WF audit program

Enjoy the extra long weekend!

-----Original Message-----

From: Welles, Laura
Sent: Thursday, October 06, 2016 4:58 PM
To: Fogarty, Johnpc <Fogarty.Johnpc@epa.gov>
Subject: RE: Straw outline for WF audit program

Great. Just as an FYI,

Ex. 6 Personal Privacy (PP)

Have a good weekend.

-----Original Message-----

From: Fogarty, Johnpc
Sent: Thursday, October 06, 2016 3:31 PM
To: Welles, Laura <Welles.Laura@epa.gov>
Subject: Re: Straw outline for WF audit program

Thanks. I have some blocks of time tomorrow and will work on refining this further. Thanks for the quick review!

Sent from my iPhone

On Oct 6, 2016, at 3:01 PM, welles, Laura <Welles.Laura@epa.gov> wrote:

See attached. I think it's a good start.

Ex. 5 AC/AWP/DP

Ex. 5 AC/AWP/DP

Let me know if you have any questions about my comments.

-----Original Message-----

From: Fogarty, Johnpc
Sent: Thursday, October 06, 2016 1:05 PM
To: Welles, Laura <Welles.Laura@epa.gov>
Subject: Straw outline for WF audit program

Would appreciate your thoughts on this. Still noodling it through but before sharing with other folks here I'd like your reaction. Thx!
<WF Audit - straw proposal_lwcomments10616.docx>

Appointment

From: Fogarty, Johnpc [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=8546B387C687410D88EEEE387DADDF56-JFOGAR02]
Sent: 9/29/2016 2:28:59 PM
To: Welles, Laura [Welles.Laura@epa.gov]

Subject: Accepted: Whole Foods

Location: Andy's office or Call in #

Ex. 6 Personal Privacy (PP)

Start: 10/3/2016 8:00:00 PM

End: 10/3/2016 9:00:00 PM

Recurrence: (none)

Message

From: Fogarty, Johnpc [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=8546B387C687410D88EEEE387DADDF56-JFOGAR02]
Sent: 9/28/2016 6:56:37 PM
To: Crossland, Andy [Crossland.Andy@epa.gov]; Saenz, Diana [Saenz.Diana@epa.gov]
CC: Sullivan, Greg [Sullivan.Greg@epa.gov]
Subject: RE: Whole Foods - meant to chat w/you about this at the general (when we were all together)

Great - thx. I talked w/Laura as well, so I think we are all in the same place!

-----Original Message-----

From: Crossland, Andy
Sent: Wednesday, September 28, 2016 2:51 PM
To: Fogarty, Johnpc <Fogarty.Johnpc@epa.gov>; Saenz, Diana <Saenz.Diana@epa.gov>
Cc: Sullivan, Greg <Sullivan.Greg@epa.gov>
Subject: RE: Whole Foods - meant to chat w/you about this at the general (when we were all together)

Sure. I was thinking along those lines as well and just popped in on Diana, who agrees - although I'd be glad to be kept in the CC loop generally so as to avoid playing catch up. And it should be interesting!

I'll let Laura know the plan...

---Andy

Andy Crossland
Waste Enforcement Branch, Acting Chief
Waste and Chemical Enforcement Division
Environmental Protection Agency
1200 Pennsylvania Ave. N.W.
Washington D.C. 20460
202-564-0574
crossland.andy@epa.gov

-----Original Message-----

From: Fogarty, Johnpc
Sent: Wednesday, September 28, 2016 2:03 PM
To: Saenz, Diana <Saenz.Diana@epa.gov>; Crossland, Andy <Crossland.Andy@epa.gov>
Subject: Whole Foods - meant to chat w/you about this at the general (when we were all together)

So sorry about that... Here is my thinking on handling WH going forward, being mindful of both your time (there's enough going on) as well as that this is otherwise in the division's bailiwick, familiarity with this kind of relief, etc. What I'd like to do is similar to how I've managed other cases (like DWH and others) out of the IO, which would be that I'd work closely/directly with Laura and free you guys of the need/expectation for day-to-day involvement. Where I'd like to make sure you all are involved is for periodic check-ins for where things are and next steps, and also to get with you for input/expertise as we craft the injunctive relief package and other issues as they come up.

Does that make sense? Thx!

Appointment

From: Wenisch, Michelle [Wenisch.Michelle@epa.gov]
Sent: 4/3/2017 7:06:45 PM
To: Wenisch, Michelle [Wenisch.Michelle@epa.gov]; Welles, Laura [Welles.Laura@epa.gov]; Fogarty, Johnpc [Fogarty.Johnpc@epa.gov]; John Hempfling (CE CEN) [John.Hempfling@wholefoods.com]; Jennifer Hartman King [jhartmanking@kingwilliamslaw.com]
Subject: Whole Foods CAFO Conference Call
Start: 4/4/2017 7:00:00 PM
End: 4/4/2017 7:30:00 PM
Show Time As: Busy
Recurrence: (none)

Please join me in a conference call on Tuesday, April 4, 2017, beginning at 3 p.m. EDT, to discuss the pending Whole Foods Consent Agreement and related matters.

Please call the following telephone number:
Reservationless Plus Toll Free Dial-In Number:

Ex. 6 Personal Privacy (PP)

When prompted, please enter the following
Conference Code, followed by the pound sign:

Ex. 6 Personal Privacy (PP)

I look forward to speaking with all of you.

Thank you,
Michelle Wenisch
Senior Counsel
Environmental Appeals Board
202-233-0120

Appointment

From: Wenisch, Michelle [Wenisch.Michelle@epa.gov]
Sent: 3/15/2017 3:13:04 PM
To: Wenisch, Michelle [Wenisch.Michelle@epa.gov]; Welles, Laura [Welles.Laura@epa.gov]; Fogarty, Johnpc [Fogarty.Johnpc@epa.gov]; Shinkman, Susan [Shinkman.Susan@epa.gov]; John Hempfling (CE CEN) [John.Hempfling@wholefoods.com]; Jennifer Hartman King [jhartmanking@kingwilliamsllaw.com]
CC: Kelley, Rosemarie [Kelley.Rosemarie@epa.gov]

Subject: Whole Foods CAFO Conference Call

Start: 3/31/2017 7:00:00 PM
End: 3/31/2017 7:30:00 PM
Show Time As: Busy

Recurrence: (none)

Please join me in a conference call on Friday, March 31, 2017, from 3:00 to 3:30 p.m. EDT, to discuss the pending Whole Foods Market Consent Agreement and related matters.

Please call the following telephone number:

Reservationless Plus Toll Free Dial-In Number:

Ex. 6 Personal Privacy (PP)

When prompted, please enter the following

Conference Code, followed by the pound sign:

Ex. 6 Personal Privacy (PP)

I look forward to speaking with all of you.

Thank you,

Michelle A. Wenisch

Senior Counsel
Environmental Appeals Board
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Mail Code 1103M
Washington, D.C. 20460
(202) 233-0122

Appointment

From: Wenisch, Michelle [Wenisch.Michelle@epa.gov]
Sent: 2/7/2017 9:25:20 PM
To: Wenisch, Michelle [Wenisch.Michelle@epa.gov]; Welles, Laura [Welles.Laura@epa.gov]; Fogarty, Johnpc [Fogarty.Johnpc@epa.gov]; Jonesi, Gary [Jonesi.Gary@epa.gov]; John.Hempfling@wholefoods.com; jhartmanking@kingwilliamslaw.com
Subject: Proposed Whole Foods Market Consent Agreement
Location: Conference Call
Start: 2/9/2017 8:00:00 PM
End: 2/9/2017 8:30:00 PM
Show Time As: Busy

Please join me in a conference call on Thursday, February 9, 2017, from 3 to 3:30pm, to discuss the pending Whole Foods Market Consent Agreement.

Please call the following telephone number:
Reservationless Plus Toll Free Dial-In Number:

Ex. 6 Personal Privacy (PP)

When prompted, please enter the following
Conference Code, followed by the pound sign:

Ex. 6 Personal Privacy (PP)

I look forward to speaking with all of you.

Thank you,

Michelle A. Wenisch

Senior Counsel
Environmental Appeals Board
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Mail Code 1103M
Washington, D.C. 20460
(202) 233-0122

Appointment

From: Starfield, Lawrence [Starfield.Lawrence@epa.gov]
Sent: 2/7/2017 4:08:30 PM
To: Starfield, Lawrence [Starfield.Lawrence@epa.gov]; Schwab, Justin [schwab.justin@epa.gov]; Cozad, David [Cozad.David@epa.gov]; Shinkman, Susan [Shinkman.Susan@epa.gov]; Brooks, Phillip [Brooks.Phillip@epa.gov]; Belser, Evan [Belser.Evan@epa.gov]; Fogarty, Johnpc [Fogarty.Johnpc@epa.gov]; Kelley, Rosemarie [Kelley.Rosemarie@epa.gov]; Welles, Laura [Welles.Laura@epa.gov]
Subject: Briefing w/Justin/OECA re: VW, Fiat Chrysler and Whole Foods
Location: 3216WJC South
Start: 2/10/2017 4:30:00 PM
End: 2/10/2017 6:00:00 PM
Show Time As: Busy

******Please DO NOT forward this calendar invitation. You may “Accept” or “Decline” the invitation but DO NOT respond with questions or concerns. If you do have any questions or concerns about this invitation please contact Ethel Bailey.**
Thank you

Message

From: Jennifer Hartman King [JHartmanKing@kingwilliamslaw.com]
Sent: 1/17/2017 5:03:33 PM
To: Welles, Laura [Welles.Laura@epa.gov]; Jackie Flores [JFlores@kingwilliamslaw.com]
CC: Fogarty, Johnpc [Fogarty.Johnpc@epa.gov]; John Hempfling (CE CEN) [John.Hempfling@wholefoods.com]
Subject: Re: EPA CAFO/SEP

Thank you. Jackie, will you please send a calendar invitation with conference line information. Please note that this call is today at 11:00 am our time. Thank you.

Sent from my iPhone

On Jan 17, 2017, at 8:48 AM, Welles, Laura <Welles.Laura@epa.gov> wrote:

2 pm EST works for us.

From: Jennifer Hartman King [mailto:JHartmanKing@kingwilliamslaw.com]
Sent: Tuesday, January 17, 2017 11:27 AM
To: Fogarty, Johnpc <Fogarty.Johnpc@epa.gov>
Cc: Welles, Laura <Welles.Laura@epa.gov>; John Hempfling (CE CEN) <John.Hempfling@wholefoods.com>
Subject: Re: EPA CAFO/SEP

Good morning. I can make that work if needed, but 2:00 pm EST would be much easier for me. Would that work?

Sent from my iPhone

On Jan 17, 2017, at 5:37 AM, Fogarty, Johnpc <Fogarty.Johnpc@epa.gov> wrote:

Great- thank you! How does 1pm eastern/10am pacific work for everyone?

From: Jennifer Hartman King [mailto:JHartmanKing@kingwilliamslaw.com]
Sent: Monday, January 16, 2017 9:04 PM
To: Welles, Laura <Welles.Laura@epa.gov>; John Hempfling (CE CEN) <John.Hempfling@wholefoods.com>
Cc: Fogarty, Johnpc <Fogarty.Johnpc@epa.gov>
Subject: RE: EPA CAFO/SEP

Hi, all. I think a call could be very helpful in tying up the final remaining loose ends. We are down to the wire now, so I will make myself available whenever it works for the group to have a call.

In the meantime, John and Laura, here is the information you requested for GPRA reporting:

Formula	Total
Ex. 4 CBI	176,678.4 lbs.
Ex. 4 CBI	11,748 lbs.
Ex. 4 CBI	31,996.8 lbs.

We separated California and Washington because stores located in those states generate state-specific (i.e., non-RCRA) hazardous/dangerous waste. These are rough numbers based on an approximate average, but I believe they should give you what you need. Please let me know if you have any questions or need anything more on this.

Jennifer Hartman King, Managing Partner
<image001.png>

520 Capitol Mall, Suite 750
Sacramento, CA 95814
916-379-7530 – Main phone
916-379-7533 – Direct dial
916-379-7535 – Fax
Email: JHartmanKing@KingWilliamsLaw.com

Website: www.KingWilliamsLaw.com
[Click Here for King Williams LLP News and Alerts](#)

This email and any transmission with it may contain privileged or otherwise confidential information. If you are not the intended recipient, or believe that you have received this communication in error, please advise the sender via reply email and delete the email you received.

From: Welles, Laura [<mailto:Welles.Laura@epa.gov>]
Sent: Friday, January 13, 2017 12:08 PM
To: Jennifer Hartman King <JHartmanKing@kingwilliamslaw.com>; John Hempfling (CE CEN) <John.Hempfling@wholefoods.com>
Cc: Fogarty, Johnpc <Fogarty.Johnpc@epa.gov>
Subject: RE: EPA CAFO/SEP

Jennifer and John,

Are you available for a quick call early next week (like Tuesday) just to wrap up any loose ends (draft final CAFO, audit, Appendices, etc.)? We were thinking a call might be faster than going back and forth via email.

Let us know.

Thanks,
Laura

Laura Welles
Attorney Advisor
Waste and Chemical Enforcement Division
Office of Civil Enforcement
U.S. Environmental Protection Agency
(202) 564-2754

From: Fogarty, Johnpc
Sent: Friday, January 13, 2017 9:44 AM
To: Jennifer Hartman King <JHartmanKing@kingwilliamslaw.com>; Welles, Laura <Welles.Laura@epa.gov>
Cc: John Hempfling (CE CEN) <John.Hempfling@wholefoods.com>
Subject: RE: EPA CAFO/SEP

Thanks – these edits look fine, but one clarifying question on the change to the last sentence of Paragraph 3, which was changed as follows:

“Schools or community centers to be selected for lighting replacements and training under this SEP shall be located in ~~each region~~ the regions of the United States (e.g., Northeast, Mid-Atlantic, Pacific Northwest, etc.) where Whole Foods Market Stores are located ...”

We were trying to make sure that the projects would be more or less distributed throughout the country (or, put differently, wouldn't all be concentrated in a single area). I assume that the edit above is intended to cover the situation that some small regions may not have a suitable candidate because they are smaller, or that the funds won't be sufficient to cover at least one project in each of the regions, etc. If that's the case, I can understand that. Is there still a way to accommodate the “concentration” concern (such as, can we say that they will be located in “multiple regions”)?

Thx!

From: Jennifer Hartman King [mailto:JHartmanKing@kingwilliamslaw.com]
Sent: Thursday, January 12, 2017 6:45 PM
To: Fogarty, Johnpc <Fogarty.Johnpc@epa.gov>; Welles, Laura <Welles.Laura@epa.gov>
Cc: John Hempfling (CE CEN) <John.Hempfling@wholefoods.com>; Jennifer Hartman King <JHartmanKing@kingwilliamslaw.com>
Subject: RE: EPA CAFO/SEP

Hi, all. No problem at all. I understand what is needed and will work on pulling the information together as quickly as possible. I'll do my best to get it to you by tomorrow.

In the meantime, attached for your review is the SEP Addendum and a mark-up showing our revisions. Here are a few things to note:

- <!--[if !supportLists]--><!--[endif]-->We listed the deadline for completing the SEP as 3 years (see paragraph 7), per your suggestion.
- <!--[if !supportLists]--><!--[endif]-->We extended the timeframe for submitting the SEP Completion Report from 30 to 90 days (see paragraph 8). This report will require quite a bit of information, so we think we will need this amount of time to prepare it. Hopefully, this is acceptable to you.
- <!--[if !supportLists]--><!--[endif]-->In paragraph 9, we borrowed from the language that we agreed to add to the CAFO regarding the certification approval process. This is our effort to clarify the process/timing for obtaining EPA's response to WFM's SEP Completion Report. Hopefully, this is acceptable to you, as well.

Many thanks,
Jennifer

Jennifer Hartman King, Managing Partner
<image003.png>

520 Capitol Mall, Suite 750
Sacramento, CA 95814
916-379-7530 – Main phone
916-379-7533 – Direct dial
916-379-7535 – Fax
Email: JHartmanKing@KingWilliamsLaw.com

Website: www.KingWilliamsLaw.com
[Click Here for King Williams LLP News and Alerts](#)

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From: Fogarty, Johnpc [<mailto:Fogarty.Johnpc@epa.gov>]
Sent: Thursday, January 12, 2017 2:09 PM
To: John Hempfling (CE CEN) <John.Hempfling@wholefoods.com>; Jennifer Hartman King <JHartmanKing@kingwilliamsllaw.com>; Welles, Laura <Welles.Laura@epa.gov>
Subject: RE: EPA CAFO/SEP

GPRA = Government Performance and Results Act. We have to report up the results of our actions to OMB. All we're looking for here is an estimate of how many pounds of haz waste will be properly managed under the settlement. A rough estimate is fine (avg # lbs per store in a year times the number of stores). We don't want to ourselves make a wild guess at it, as it would be better to have it come from you all. Not looking for a rocket-science estimate, just a reasoned one you're comfortable with. Thanks!

From: John Hempfling (CE CEN) [<mailto:John.Hempfling@wholefoods.com>]
Sent: Thursday, January 12, 2017 5:00 PM
To: Jennifer Hartman King <jhartmanking@kingwilliamsllaw.com>; Welles, Laura <Welles.Laura@epa.gov>; Fogarty, Johnpc <Fogarty.Johnpc@epa.gov>
Subject: EPA CAFO/SEP

Hey Jenn:

I just talked to Laura and told her that the delay on the SEP appendix was my fault, but that I'd returned it to you about 30 minutes ago and it should be good to go today or tomorrow.

Also, Laura told me that for the Government Performance and Results Act ("GPRA") reporting requirement, they need to get the average pounds of hazardous materials handled through our program per store covered by the CAFO (so pounds of material multiplied by store covered under the CAFO). I told her I had no idea what that was, but it was probably something you knew off the top of your head. (Frankly, when she first asked, I thought "GPRA" was the average I left the University of Texas with that resulted in me not attending law school at Harvard...)

Laura: As we discussed, if I screwed any of that up please feel free to jump in and correct my mistakes.

Jenn: Let me know if you need me to help round anything up.

Thanks,

John

John H. Hempfling II
Sr. Global Litigation Counsel
Whole Foods Market Central Office
550 Bowie Street
Austin, Texas 78703
(512) 542-0213 (Office)
(512) 482-7213 (Fax)

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Message

From: Norris, Munsel [Norris.Munsel@epa.gov]
Sent: 4/3/2017 2:12:19 PM
To: OECA-OCE-MANAGERS [OECAOCEMANAGERS@epa.gov]
Subject: Scout Report
Attachments: Report.pdf

Importance: High

Good morning,

Please review the attached document and send me all additions/revisions by **cob Wednesday, April 5, 2017.**

Thanks,
Munsel Norris
Information Technology Specialist
OECA/OCE/RMS
(202) 564-6659 – office phone
(202) 579-8514 - iphone

Message

From: Welles, Laura [Welles.Laura@epa.gov]
Sent: 4/5/2017 3:48:59 PM
To: Fogarty, Johnpc [Fogarty.Johnpc@epa.gov]
Subject: RE: In the Matter of Whole Foods Market Group, Inc., et al. (Docket No. RCRA-HQ-2017-0001)

I think you're right about substance. I'll incorporate your edits and send along to Susan.

From: Fogarty, Johnpc
Sent: Wednesday, April 05, 2017 11:36 AM
To: Welles, Laura <Welles.Laura@epa.gov>
Subject: RE: In the Matter of Whole Foods Market Group, Inc., et al. (Docket No. RCRA-HQ-2017-0001)

Ex. 5 AC/AWP/DP

From: Welles, Laura
Sent: Wednesday, April 05, 2017 9:30 AM
To: Fogarty, Johnpc <Fogarty.Johnpc@epa.gov>
Subject: In the Matter of Whole Foods Market Group, Inc., et al. (Docket No. RCRA-HQ-2017-0001)

John – See below for draft email from Susan to EAB. Per Michelle's instructions, the email is addressed to the clerk of the board (Eurika Durr) with copies to Michelle and WFM counsel.

Ex. 5 AC/AWP/DP

Ex. 5 AC/AWP/DP

Ex. 5 AC/AWP/DP

I know this isn't rocket science – I just want this to be sufficient for the board so they'll ratify the agreement. Thanks,
Laura

Ex. 5 AC/AWP/DP

Please let me or my staff know if you have any questions concerning this matter.

Sincerely,

Susan Shinkman
Director, Office of Civil Enforcement
U.S. Environmental Protection Agency
Washington, DC
202-564-3257

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Message

From: Welles, Laura [Welles.Laura@epa.gov]
Sent: 4/5/2017 12:28:51 PM
To: Fogarty, Johnpc [Fogarty.Johnpc@epa.gov]; Shinkman, Susan [Shinkman.Susan@epa.gov]
Subject: RE: EPA/Whole Foods Market Administrative Settlement

Yes – I'll get the draft email to you this morning.

From: Fogarty, Johnpc
Sent: Wednesday, April 05, 2017 8:23 AM
To: Shinkman, Susan <Shinkman.Susan@epa.gov>; Welles, Laura <Welles.Laura@epa.gov>
Subject: RE: EPA/Whole Foods Market Administrative Settlement

Laura, can you please draft up an email that Susan can send to the EAB (by early afternoon)? Thx.

From: Shinkman, Susan
Sent: Tuesday, April 04, 2017 7:30 PM
To: Welles, Laura <Welles.Laura@epa.gov>
Cc: Fogarty, Johnpc <Fogarty.Johnpc@epa.gov>
Subject: RE: EPA/Whole Foods Market Administrative Settlement

Thanks for preparing – I have sent it on.

Susan

From: Welles, Laura
Sent: Tuesday, April 04, 2017 4:29 PM
To: Shinkman, Susan <Shinkman.Susan@epa.gov>
Cc: Fogarty, Johnpc <Fogarty.Johnpc@epa.gov>
Subject: EPA/Whole Foods Market Administrative Settlement

Susan – See below for draft email to Larry. I also attached the 2/10 briefing document in case you want to send that along to Larry. Laura

Larry,

Ex. 5 AC/AWP/DP

Susan

ALAMEDA COUNTY
DEC 31 2014
CLERK OF THE SUPERIOR COURT
By CHERYL CLARK Deputy

NANCY E. O'MALLEY
District Attorney of Alameda County
KENNETH A. MIFSUD, SBN 144000
Assistant District Attorney
Consumer and Environmental Protection Division
7677 Oakport Street, Suite 650
Oakland, CA 94621-1934
Telephone: (510) 569-8816

FILED
ALAMEDA COUNTY

JAN 02 2015

CLERK OF THE SUPERIOR COURT
By K. McCoy Deputy

TONY RACKAUCKAS
District Attorney of Orange County
WILLIAM G. FALLON, SBN 190986
Deputy District Attorney
401 Civic Center Drive W.
Santa Ana, CA 92701
Telephone: (714) 834-3600

Attorneys for Plaintiff,
The People of the State of California

[Additional Plaintiff's Counsel Continued on Exhibit A]

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ALAMEDA

THE PEOPLE OF THE STATE OF CALIFORNIA,)
Plaintiff,)

v.)

SAFEWAY INC., a Delaware Corporation,)
Defendant(s))

Case No. RG 14758173

~~STIPULATION FOR ENTRY OF~~
FINAL JUDGMENT AND
PERMANENT INJUNCTION

*Exempt from fees per
Government Code §6103*

WHEREAS, this Stipulation for Entry of Final Judgment and Permanent Injunction ("Final Judgment") is entered into by Plaintiff, the People of the State of California ("People"), and Defendant Safeway Inc., ("Defendant" or "Safeway") that does and did business in its own capacity and/or through agents, affiliates, and subsidiaries, by their respective attorneys. The People and Defendant shall be referred to collectively as "Parties." The Parties have stipulated and consented to the entry of this Final Judgment prior to trial. The Parties have agreed to settle

the above captioned matter without further litigation, as set forth below.

AND WHEREAS, the Court finds that the settlement between the Parties is fair and in the public interest;

NOW THEREFORE, upon the consent of the Parties, it is hereby ORDERED, ADJUDGED, AND DECREED:

FINAL JUDGMENT AND PERMANENT INJUNCTION ON CONSENT

1. JURISDICTION

The Parties stipulate and agree that the Superior Court of California, County of Alameda, has subject matter jurisdiction over the matters alleged in this action and personal jurisdiction over the Parties to this Final Judgment.

2. SETTLEMENT OF DISPUTED CLAIMS

This Final Judgment is not an admission or denial by Defendant regarding any issue of law or fact in the above-captioned matter or any violation of any law. The Parties enter into this Final Judgment pursuant to a compromise and settlement of disputed claims, as set forth in the Complaint filed in this action for the purpose of furthering the public interest. The People believe that the resolution embodied in this Final Judgment is fair and reasonable and fulfills the People's enforcement objectives; and that except as provided in this Final Judgment, no further action is warranted concerning the allegations contained in the Complaint. Defendant agrees that this Final Judgment is a fair and reasonable resolution of the matters alleged in the Complaint.

All Parties have stipulated and consented to the entry of this Final Judgment prior to the taking of any proof, and without trial or adjudication of any fact or law herein. The Parties also waive their right to appeal.

3. DEFINITIONS

Except where otherwise expressly defined in this Final Judgment, all terms shall be interpreted consistent with the Hazardous Waste Control Law, Health and Safety Code Sections 25100-25258.2; Hazardous Materials Release Response Plans and Inventory Law, Health and Safety Code Sections 25500-25520; the Medical Waste Management Act, Health and Safety Code Sections 117600-118360; and the regulations promulgated under these sections.

“California Facilities” means any Safeway facility in the State of California including, but not limited to, retail stores, pharmacies, distribution centers, and trucking operations owned or operated by Defendant and used to transport products and materials to and from such facilities located in the State of California that prior to or as of December 1, 2014, are owned or operated by Defendant as identified in Exhibits B-1 and B-2, attached. “Open Facilities” are listed in Exhibit B-1 and are those facilities open as of December 1, 2014. “Closed Facilities” are those listed in Exhibit B-2 and are those facilities that were open as of April 25, 2007, but closed prior to December 1, 2014. Exhibit B shall not be to the exclusion of any locations that may have been inadvertently omitted, where the Parties agree in writing that an omitted location should be included. As to any locations that have been omitted, Defendant shall provide the following to the People within thirty (30) days after the omission comes to the attention of Defendant: (a) written notice of such additional locations; and (b) to the best of Defendant’s knowledge and belief, copies of any notices of violation and/or governmental inspection reports applicable to such locations that have been received by that location since April 25, 2007, to the date of entry of this Final Judgment. If after the People have had sufficient time within which to review the alleged reason for the omission and after Defendant has established to the satisfaction of the People that the omission was inadvertent, the Parties shall agree in writing that the additional location(s) be included in the Final Judgment.

“Certified Unified Program Agency” or “CUPA” is an agency certified by the California Environmental Protection Agency pursuant to the requirements of Chapter 6.11 of the Health and Safety Code and California Code of Regulations, Title 27, Sections 15100-16150 to implement certain State environmental programs within the local agency’s jurisdiction.

“Participating Agency” means an agency that has been designated by the CUPA to administer one or more state environmental programs on behalf of the CUPA.

“Release” includes, but is not limited to, any spilling, leaking, pumping, injecting, escaping, leaching, dumping, or disposing into the environment.

4. INJUNCTIVE RELIEF

Pursuant to the provisions of Health and Safety Code sections 25181, 25515.6, 118325,

and Business and Professions Code section 17203, and subject to Paragraph 23 below, Defendant shall comply with the Hazardous Waste Control Law, Health and Safety Code Sections 25100-25258.2; Hazardous Materials Release Response Plans and Inventory Law, Health and Safety Code Sections 25500-25520; the Medical Waste Management Act, Health and Safety Code Sections 117600-118360; the Confidentiality of Medical Information Act, Civil Code sections 56-56.37; and the applicable regulations promulgated under these sections, to the extent that these provisions apply to Safeway's business operations at its Open Facilities. Failure to comply with this injunction or any of the specific additional injunctive provisions that follow may subject Defendant to sanctions, including, but not limited to, contempt and/or additional penalties. Paragraph 15, below, applies to any application or motion for failure to comply with the injunctive provisions of this Final Judgment.

4.1 Specific Injunctive Provisions

Defendant shall comply with each of the following provisions at and from the Open Facilities to the extent that these provisions apply to Safeway's business operations at its Open Facilities:

4.1.a Defendant shall not dispose, or cause the disposal, of any hazardous waste at a point not authorized or permitted by the Department of Toxic Substances Control ("DTSC"), in violation of Health & Safety Code Sections 25189, including, without limitation, to any trash compactor, dumpster, drain, sink, or toilet at any of the Open Facilities, or onto the surface or subsurface of the ground at any unauthorized location, or at a landfill or transfer station not authorized to receive hazardous waste.

4.1.b Defendant shall determine, at each Open Facility, whether each item returned by a customer to that facility is "waste" as defined by California Code of Regulations, Title 22, Section 66261.2, and if so, determine if that waste is "hazardous waste," as required by California Code of Regulations, Title 22, Section 66262.11.

4.1.c Defendant shall determine, at each Open Facility, whether each waste generated at that facility as a result of a spill, container breakage or other means rendering the product not usable for its intended purpose, is a "hazardous waste" as required by California

5.1 Civil Penalties

5.1.a Defendant shall pay Six Million Seven Hundred and Twenty Thousand Dollars (\$6,720,000) as civil penalties for alleged violations of the above-referenced laws, pursuant to Health and Safety Code sections 25189 and 25515 and Business and Professions Code section 17206, to the prosecuting agencies/regulatory agencies identified in, and in accordance with the terms of, Exhibits C-1 and C-2, attached.

5.2 Supplemental Environmental Projects

Defendant shall pay **Two Million Dollars (\$2,000,000)** for supplemental environmental projects identified in, and in accordance with the terms of, Exhibit D, attached.

5.3 Enhanced Environmental Compliance Efforts

Defendant agrees to continue to work toward and maintain innovative improvements in its computerized hazardous waste classification scanning programs installed at all stores and distribution centers identified in Exhibit B-1 (Open Facilities). In addition, Defendant agrees to continue their First Assistant Store Manager Program designed to address environmental compliance at the store level. Defendant agrees to conduct annual dumpster audits by means and methods to be determined by Defendant, but each audit shall constitute at least 10% of the then currently operating stores and distribution centers identified in Exhibit B-1 per year, for a period of five (5) years from the date of execution of this Agreement. Defendant will provide notice to the People by notifying Kenneth A. Mifsud using the email address listed in Paragraph 8 below, at least two days in advance of each annual audit that is conducted for the purpose of compliance with this Paragraph, and allow the People the opportunity to attend and observe each such dumpster audit. Defendant will provide the results (including any and all photographs taken) to the People as part of the annual Status Report as set forth in Paragraph 22.

5.4 Reimbursement of Partial Costs of Investigation and Enforcement

Defendant shall pay One Million One Hundred and Fifty Thousand Dollars (\$1,150,000) for partial reimbursement of attorney's fees, costs of investigation, and other costs of enforcement, to the entities identified in, and in accordance with the terms of, Exhibits E-1

Message

From: Welles, Laura [Welles.Laura@epa.gov]
Sent: 1/27/2017 2:41:05 PM
To: Fogarty, Johnpc [Fogarty.Johnpc@epa.gov]
Subject: FW: EPA/Whole Foods Market Consent Agreement

Today I plan to look at the draft you sent me earlier in the week.

From: Fogarty, Johnpc
Sent: Friday, January 27, 2017 9:29 AM
To: John Hempfing (CE CEN) <John.Hempfing@wholefoods.com>; Welles, Laura <Welles.Laura@epa.gov>; Jennifer Hartman King <jhartmanking@kingwilliamslaw.com>
Subject: RE: EPA/Whole Foods Market Consent Agreement

I can appreciate that. The EPA press office's long-standing rules on press releases is that they're not shared in advance and they don't do joint press statements (except with DOJ on civil judicial cases), although an advance "head's up" is typically provided for when it will happen, to avoid folks being surprised.

With respect to the message, the press folks own the drafting pen although fortunately Laura and I are in the loop on that. We've seen their first draft of the press release, and we basically re-wrote it to make the message a positive one, to emphasize the voluntary and cooperative nature of this, and especially that WF is setting a new standard for responsible environmental management in the grocery industry and doing great things for underserved communities. We'll keep in touch with you as we get closer to when this goes "live" and will do our best to let you all know if the overall tenor of the messaging changes, but that's about as much as we can do given the constraints at our end. I hope you understand.

From: John Hempfing (CE CEN) [<mailto:John.Hempfing@wholefoods.com>]
Sent: Friday, January 27, 2017 8:43 AM
To: Welles, Laura <Welles.Laura@epa.gov>; Jennifer Hartman King <jhartmanking@kingwilliamslaw.com>
Cc: Fogarty, Johnpc <Fogarty.Johnpc@epa.gov>
Subject: RE: EPA/Whole Foods Market Consent Agreement

Laura and John:

Now that the CAFO is with the EAB would it make sense to discuss how this is going to be played by your press office? We'd like to be ahead of the curve if at all possible. (In a perfect world we'd prefer a reactive-only neutral statement by both parties rather than a proactive statement.)

Thanks,

John

John H. Hempfing II
Sr. Global Litigation Counsel
Whole Foods Market Central Office
550 Bowie Street
Austin, Texas 78703
(512) 542-0213 (Office)
(512) 482-7213 (Fax)

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From: Welles, Laura [<mailto:Welles.Laura@epa.gov>]
Sent: Wednesday, January 25, 2017 11:08 AM
To: John Hempfling (CE CEN) <John.Hempfling@wholefoods.com>; Jennifer Hartman King <jhartmanking@kingwilliamslaw.com>
Cc: Fogarty, Johnpc <Fogarty.Johnpc@epa.gov>
Subject: RE: EPA/Whole Foods Market Consent Agreement

Hi John,

It's my understanding that it could take anywhere from 3 to 4 weeks.

Laura

Laura Welles
Attorney Advisor
Waste and Chemical Enforcement Division
Office of Civil Enforcement
U.S. Environmental Protection Agency
(202) 564-2754

From: John Hempfling (CE CEN) [<mailto:John.Hempfling@wholefoods.com>]
Sent: Wednesday, January 25, 2017 9:04 AM
To: Welles, Laura <Welles.Laura@epa.gov>; Jennifer Hartman King <jhartmanking@kingwilliamslaw.com>
Cc: Fogarty, Johnpc <Fogarty.Johnpc@epa.gov>
Subject: RE: EPA/Whole Foods Market Consent Agreement

Laura:

Thanks for sending this. Any idea what the general timeline is for EAB approval?

Thanks,

John

John H. Hempfling II
Sr. Global Litigation Counsel
Whole Foods Market Central Office
550 Bowie Street
Austin, Texas 78703
(512) 542-0213 (Office)
(512) 482-7213 (Fax)

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From: Welles, Laura [<mailto:Welles.Laura@epa.gov>]
Sent: Tuesday, January 24, 2017 3:43 PM
To: Jennifer Hartman King <jhartmanking@kingwilliamsllp.com>; John Hempfling (CE CEN) <John.Hempfling@wholefoods.com>
Cc: Fogarty, Johnpc <Fogarty.Johnpc@epa.gov>
Subject: RE: EPA/Whole Foods Market Consent Agreement

The supplemental filing that included the consent agreement with CBI appendices was submitted to the EAB this afternoon. Copies of all submittals were sent to both you and John today via certified mail, return receipt requested.

Attached is a copy of the executed consent agreement.

Please let me know if you have any questions.

Thanks,
Laura

Laura Welles
Attorney Advisor
Waste and Chemical Enforcement Division
Office of Civil Enforcement
U.S. Environmental Protection Agency
(202) 564-2754

From: Jennifer Hartman King [<mailto:JHartmanKing@kingwilliamsllp.com>]
Sent: Tuesday, January 24, 2017 3:52 PM
To: Welles, Laura <Welles.Laura@epa.gov>; John Hempfling (CE CEN) <John.Hempfling@wholefoods.com>
Cc: Fogarty, Johnpc <Fogarty.Johnpc@epa.gov>
Subject: RE: EPA/Whole Foods Market Consent Agreement

Thank you very much, Laura. We look forward to receiving the service copies, and any additional updates you might have to pass along.

My best,
Jennifer

Jennifer Hartman King, Managing Partner



520 Capitol Mall, Suite 750
Sacramento, CA 95814
916-379-7530 – Main phone
916-379-7533 – Direct dial
916-379-7535 – Fax
Email: JHartmanKing@KingWilliamsLaw.com

Website: www.KingWilliamsLaw.com
[Click Here for King Williams LLP News and Alerts](#)

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From: Welles, Laura [<mailto:Welles.Laura@epa.gov>]
Sent: Monday, January 23, 2017 3:23 PM
To: Jennifer Hartman King <JHartmanKing@kingwilliamsllaw.com>; John Hempfling (CE CEN) <John.Hempfling@wholefoods.com>
Cc: Fogarty, Johnpc <Fogarty.Johnpc@epa.gov>
Subject: EPA/Whole Foods Market Consent Agreement

Hi Jennifer and John,

This is a quick email to let you know that we submitted the consent agreement with non-CBI appendices (along with EAB memo and proposed final order with certificate of service) to the EAB today. I will supplement the filing tomorrow with the CBI appendices.

Please let me know if you have any questions.

Thanks,
Laura

Laura Welles
Attorney Advisor
Waste and Chemical Enforcement Division
Office of Civil Enforcement
U.S. Environmental Protection Agency
(202) 564-2754

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Message

From: Cozad, David [Cozad.David@epa.gov]
Sent: 2/3/2017 5:14:18 PM
To: Fogarty, Johnpc [Fogarty.Johnpc@epa.gov]; Shinkman, Susan [Shinkman.Susan@epa.gov]
Subject: RE: Draft case summary for Whole Foods

Thanks John.

From: Fogarty, Johnpc
Sent: Friday, February 3, 2017 12:00 PM
To: Cozad, David <Cozad.David@epa.gov>; Shinkman, Susan <Shinkman.Susan@epa.gov>
Subject: RE: Draft case summary for Whole Foods

That works, and I am anticipating those questions as well. Quick answers below, just so you know.

-----Original Message-----

From: Cozad, David
Sent: Friday, February 03, 2017 11:27 AM
To: Fogarty, Johnpc <Fogarty.Johnpc@epa.gov>; Shinkman, Susan <Shinkman.Susan@epa.gov>
Subject: RE: Draft case summary for Whole Foods

How about "none known or anticipated, but other grocery chains may take notice . . ."

On the SEP, I am anticipating a couple questions:

Ex. 5 Deliberative Process (DP)

-----Original Message-----

From: Fogarty, Johnpc
Sent: Friday, February 3, 2017 11:20 AM
To: Cozad, David <Cozad.David@epa.gov>; Shinkman, Susan <Shinkman.Susan@epa.gov>
Subject: RE: Draft case summary for Whole Foods

Nothing specific - just that since this is a company-wide settlement, others in this sector may take notice of it (not in a bad way, just as a development in their area/what a competitor is doing). We could also say "none known or anticipated" since it is somewhat speculative.

-----Original Message-----

From: Cozad, David
Sent: Friday, February 03, 2017 11:15 AM
To: Fogarty, Johnpc <Fogarty.Johnpc@epa.gov>; Shinkman, Susan <Shinkman.Susan@epa.gov>
Subject: RE: Draft case summary for Whole Foods

Looks good. My only question is on the sentence about the potential interest by other grocery chains. If there are specific concerns or issues we think they may have and raise, we ought to identify that here.

-----Original Message-----

From: Fogarty, Johnpc

Sent: Friday, February 3, 2017 10:59 AM

To: Shinkman, Susan <Shinkman.Susan@epa.gov>; Cozad, David <Cozad.David@epa.gov>

Subject: Draft case summary for Whole Foods

I still need to run this past Laura W (the staffer on this case), but wanted to share now to see if you all think this hits the mark. As a 1-pager, it's at a "high level" so it tends to focus on the key message points and less so on the nitty-gritty of the settlement's terms. This may go too far in that direction, but I am mindful of how folks tend to try to cover every single issue in detail, even when it's supposed to be a "summary" only.

Message

From: Shinkman, Susan [Shinkman.Susan@epa.gov]
Sent: 1/18/2017 4:08:30 PM
To: Fogarty, Johnpc [Fogarty.Johnpc@epa.gov]; Kelley, Rosemarie [Kelley.Rosemarie@epa.gov]
Subject: RE: Wholefoods - last minute glitch

Let's just tell Larry at 11:30.

-----Original Message-----

From: Fogarty, Johnpc
Sent: Wednesday, January 18, 2017 10:46 AM
To: Shinkman, Susan <Shinkman.Susan@epa.gov>; Kelley, Rosemarie <Kelley.Rosemarie@epa.gov>
Subject: RE: Wholefoods - last minute glitch

Do we think we need to check in w/Cynthia?

-----Original Message-----

From: Shinkman, Susan
Sent: Wednesday, January 18, 2017 10:20 AM
To: Fogarty, Johnpc <Fogarty.Johnpc@epa.gov>; Kelley, Rosemarie <Kelley.Rosemarie@epa.gov>
Subject: RE: Wholefoods - last minute glitch

Ex. 5 AC/AWP/DP

Thanks,
Susan

-----Original Message-----

From: Fogarty, Johnpc
Sent: Wednesday, January 18, 2017 9:40 AM
To: Shinkman, Susan <Shinkman.Susan@epa.gov>; Kelley, Rosemarie <Kelley.Rosemarie@epa.gov>
Subject: Wholefoods - last minute glitch

In going over the final flyspecking on language, etc.,

Ex. 5 AC/AWP/DP

Ex. 5 AC/AWP/DP

Ex. 5 AC/AWP/DP

Ex. 5 AC/AWP/DP

Ex. 5 AC/AWP/DP

Ex. 5 AC/AWP/DP

Ex. 5 AC/AWP/DP

But, I want to run it up the chain before getting back to WF one way or the other.

Message

From: Welles, Laura [Welles.Laura@epa.gov]
Sent: 2/9/2017 10:07:55 PM
To: Fogarty, Johnpc [Fogarty.Johnpc@epa.gov]
Subject: FW: Draft case summary for Whole Foods

FYI -- meant to copy you. I'm assuming you have the final. If you're no longer in the office, I'll take a look at what Rosemarie sent and get back to her...

-----Original Message-----

From: Welles, Laura
Sent: Thursday, February 09, 2017 5:06 PM
To: Kelley, Rosemarie <Kelley.Rosemarie@epa.gov>
Subject: RE: Draft case summary for Whole Foods

I made a few comments last week and sent back to John -- I haven't seen a final version.

I'll take a look at the attached and get back to you.

-----Original Message-----

From: Kelley, Rosemarie
Sent: Thursday, February 09, 2017 5:00 PM
To: Welles, Laura <Welles.Laura@epa.gov>
Subject: FW: Draft case summary for Whole Foods

Laura --

Do you have the final whole foods case summary? The front office is asking for it.

Rosemarie

-----Original Message-----

From: Shinkman, Susan
Sent: Friday, February 03, 2017 11:01 AM
To: Kelley, Rosemarie <Kelley.Rosemarie@epa.gov>
Subject: FW: Draft case summary for Whole Foods

FYI

-----Original Message-----

From: Fogarty, Johnpc
Sent: Friday, February 03, 2017 10:59 AM
To: Shinkman, Susan <Shinkman.Susan@epa.gov>; Cozad, David <Cozad.David@epa.gov>
Subject: Draft case summary for Whole Foods

I still need to run this past Laura W (the staffer on this case), but wanted to share now to see if you all think this hits the mark. As a 1-pager, it's at a "high level" so it tends to focus on the key message points and less so on the nitty-gritty of the settlement's terms. This may go too far in that direction, but I am mindful of how folks tend to try to cover every single issue in detail, even when it's supposed to be a "summary" only.

**BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.**

IN THE MATTER OF:	)	EPA Docket No.
	)	RCRA-HQ-2017-0001
)	
)	
Whole Foods Market Group, Inc.,	)	Proceeding Under Section 3008(a) of the
Whole Foods Market California, Inc.,	)	Resource Conservation and Recovery Act,
Mrs. Gooch's Natural Food Markets, Inc.,	)	42 U.S.C. § 6928(a)
Whole Foods Market Pacific Northwest, Inc.,)	
Whole Foods Market Rocky Mountain/ Southwest, L.P.,)	
WFM Northern Nevada, Inc.,)	
WFM Southern Nevada, Inc.,)	
WFM Hawaii, LLC,)	
WFM Kansas, LLC,)	
WFM-WO, Inc.,)	
Nature's Heartland, Inc.,)	
WFM Nebraska, LLC, and)	
Whole Foods Market Lusher Court Frisco CO, LLC)	
)	
RESPONDENTS.)	

CONSENT AGREEMENT AND FINAL ORDER

APPENDIX A

BUSINESS CONFIDENTIALITY ASSERTED IN ACCORDANCE WITH 40 C.F.R. § 22.5(d)

CONSENT AGREEMENT AND FINAL ORDER

APPENDIX A

IN ACCORDANCE WITH 40 C.F.R. § 22.5(d), INFORMATION CLAIMED CONFIDENTIAL HAS BEEN DELETED.

A COMPLETE COPY OF THE DOCUMENT CONTAINING THE INFORMATION CLAIMED CONFIDENTIAL HAS BEEN FILED WITH THE REGIONAL HEARING CLERK.

**BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.**

IN THE MATTER OF:	)	EPA Docket No.
	)	RCRA-HQ-2017-0001
)	
)	
Whole Foods Market Group, Inc.,	)	Proceeding Under Section 3008(a) of the
Whole Foods Market California, Inc.,	)	Resource Conservation and Recovery Act,
Mrs. Gooch's Natural Food Markets, Inc.,	)	42 U.S.C. § 6928(a)
Whole Foods Market Pacific Northwest, Inc.,)	
Whole Foods Market Rocky Mountain/ Southwest, L.P.,)	
WFM Northern Nevada, Inc.,)	
WFM Southern Nevada, Inc.,)	
WFM Hawaii, LLC,)	
WFM Kansas, LLC,)	
WFM-WO, Inc.,)	
Nature's Heartland, Inc.,)	
WFM Nebraska, LLC, and)	
Whole Foods Market Lusher Court Frisco CO, LLC)	
)	
RESPONDENTS.)	

CONSENT AGREEMENT AND FINAL ORDER

APPENDIX A

BUSINESS CONFIDENTIALITY ASSERTED IN ACCORDANCE WITH 40 C.F.R. § 22.5(d)

Appendix G

Replacement of Lighting Ballasts and Light Bulbs in Public Schools and Community Centers

1. Whole Foods Market shall provide for the removal and proper disposal of fluorescent lighting ballasts that contain polychlorinated biphenyls (PCBs) and the replacement and installation of new energy-efficient, PCB-free replacement lighting ballasts and light bulbs for public schools and/or community centers, as provided in this Appendix (“School Lighting Replacement SEP” or “SEP”). The focus of the School Lighting Replacement SEP is to protect the environment and public health by facilitating the safe identification, removal, and disposal of fluorescent lighting ballasts containing PCBs, and to replace them with energy efficient, non-PCB containing lighting fixtures. The School Lighting Replacement SEP shall: seek to reduce the use of lighting ballasts that contain PCBs in schools and/or community centers serving children (persons under the age of 18), including day-care centers and early childhood centers; ensure that equipment containing PCBs that is removed in this project is handled and disposed (removed from commerce) in accordance with applicable federal regulations set forth in 40 C.F.R. Part 761; and reduce energy demand through installation of energy-efficient lighting that contributes towards reduction in compounded toxics in the energy sector. Whole Foods Market shall also provide training to the school and community center personnel who handle hazardous waste. The training shall address the proper identification, handling and disposal of hazardous wastes located and used in the schools and community centers where this SEP is performed.

2. Whole Foods Market shall expend \$2.75 million to implement this SEP.

3. To identify public schools and/or community centers in which to perform this SEP, Whole Foods Market shall:

a. Identify candidate communities in which to perform this SEP that:

i. Have low- to moderate- income residents within the candidate community, which may be identified by reference to census block group and tract data, as calculated by the Department of Housing and Urban Development (see <https://www.hudexchange.info/programs/acs-low-mod-summary-data/acs-low-mod-summary-data-block-groups-places/>);

ii. Are within a 50-mile radius of a Whole Foods Market store covered by this CAFO; and

iii. Have one or more public school and/or community center facilities located within the candidate community (*e.g.* within the census block group and tract).

b. Consult with the relevant public school district or other state or local authority with jurisdiction over the school or community center facilities to identify facilities which have or are likely to have lighting ballasts that contain PCBs (likely for

schools or community centers built before 1979 that have not had extensive lighting retrofits since 1979 and are using T-12 magnetic lighting ballasts). Priority for lighting ballast replacement should be given to those schools or centers with a significant number of children who qualify for a reduced or free lunch program.

Schools or community centers to be selected for lighting replacements and training under this SEP shall be located in multiple regions of the United States (*e.g.*, Northeast, Mid-Atlantic, Pacific Northwest, etc.) where Whole Foods Market Stores are located, as identified in Paragraph 1 of the CAFO and listed in Appendix A.

4. All replacement lighting ballasts and light bulbs shall be electronic and shall have an energy efficiency that is equivalent to or better than T-8 (based on energy efficiency standards set by the U. S. Department of Energy) with preference given to LED light fixtures, if feasible.

5. Lighting ballasts removed under this SEP shall be assumed to have PCB waste and shall be properly disposed of in accordance with 40 C.F.R. Part 761, unless such ballasts are clearly marked or labeled to have no PCBs.

6. Whole Foods Market is responsible for the satisfactory completion of this SEP in accordance with the requirements of this Appendix. Whole Foods Market may use contractors or consultants in planning and implementing this SEP.

7. The School Lighting Replacement SEP shall be completed within three (3) years after the Effective Date of this CAFO; however, this date may be extended by mutual agreement between Whole Foods Market and EPA in writing.

8. Upon completion of this SEP, Whole Foods Market shall submit to EPA a “SEP Completion Report” no later than ninety (90) days from the date of the SEP’s completion. The SEP Completion Report shall contain, at a minimum:

- a. A detailed description of the School Lighting Replacement SEP as completed, including the number and locations of the schools and/or community centers addressed under this SEP along with the number of fixtures with replaced lighting at each school and/or center;
- b. A description of how low- or moderate-income communities meeting the criteria in Paragraph 3.a were identified;
- c. Records demonstrating that the lighting ballasts were properly disposed of in accordance with 40 C.F.R. Part 761;
- d. The dates and locations of each training session provided for school and community center personnel, the number of personnel receiving such training, and a summary description or course outline of the training;
- e. A description of any problem(s) encountered in completing the SEP and their solution(s);
- f. An itemized list and/or documentation of all SEP costs expended;

g. Evidence or information documenting the SEP's completion (which may include, but is not limited to, photos, vendor invoices or receipts, correspondence from SEP recipients, etc.); and

h. To the extent possible, a statement of the benefits associated with this SEP as implemented and an explanation of how such benefits were measured or estimated.

The SEP Completion Report must be certified by an appropriate corporate official, and a certificate stating:

"I certify that the project has been fully implemented pursuant to the provisions of the Consent Agreement and Final Order in *In the Matter of Whole Foods Market Group, Inc., et al.*, EPA Docket No. RCRA-HQ-2017-0001, that I am familiar with the information in this document, and that, based on my inquiry of those individuals responsible for obtaining the information, it is true and complete to the best of my knowledge. I know that there are significant penalties for submitting false information, including the possibility of fines and imprisonment for knowing violations."

9. EPA may require information in addition to that described in the preceding Paragraph, in order to evaluate Whole Foods Market's completion of the SEP. After receiving the SEP Completion Report, EPA shall notify Whole Foods Market in writing within sixty (60) days whether it agrees that the SEP is satisfactorily completed, or if EPA does not agree it shall identify the basis for its position. "Satisfactorily completed" means completion of this SEP in accordance with the provisions of this Appendix G. If EPA does not agree that Whole Foods Market has satisfactorily completed the SEP, Whole Foods Market shall address the matters identified in EPA's objection, and may thereafter recertify completion of the SEP. Upon notification by EPA that it agrees with Respondents' certification, or if EPA does not respond within sixty (60) days, Whole Foods Market shall have no further obligations under this SEP.

10. Whole Foods Market certifies the truth and accuracy of each of the following:

a. that, as of the date of executing this CAFO, Whole Foods Market is not required to perform or develop any SEP in this Appendix by any federal, state, or local law or regulation and is not required to perform or develop this SEP by agreement, grant, or as injunctive relief awarded in any other action in any forum;

b. that the SEP is not a project that Whole Foods Market was planning or intending to construct, perform, or implement other than in settlement of the claims resolved in this CAFO;

c. that Whole Foods Market has not received and will not receive credit for this SEP in any other enforcement action; and

d. that Whole Foods Market will not receive any reimbursement for any portion of this SEP from any other person.

11. Whole Foods Market further certifies that it is not a party to any open federal financial assistance that is funding or could be used to fund the same activity as this SEP, and that to the best Whole Foods Market's knowledge and belief after reasonable inquiry, there is no

such open federal financial transaction that is funding or could be used to fund the same activity as this SEP, nor has the same activity been described in an unsuccessful federal financial assistance transaction proposal to EPA within two years of the date of this settlement (unless the project was barred from funding as statutorily ineligible). For purposes of this certification, the term “open federal financial assistance” refers to a grant, cooperative agreement, loan, federally-guaranteed loan guarantee, or other mechanism for providing federal financial assistance whose performance period has not yet expired.

12. Disputes concerning the satisfactory performance of this SEP may be resolved under Section VII of this CAFO (Dispute Resolution).

13. Any public statement, oral or written in print, film, or other media, made by Whole Foods Market making reference to this SEP shall include the following language: “This project was undertaken in connection with the settlement of an enforcement action, *In the Matter of Whole Foods Market Group, Inc., et al.*, EPA Docket No. RCRA-HQ-2017-0001, to enforce federal laws.”

14. For federal income tax purposes, Whole Foods Market agrees that it will neither capitalize into inventory or basis nor deduct any costs or expenditures incurred in performing this SEP.

**BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.**

IN THE MATTER OF:	)	EPA Docket No.
	)	RCRA-HQ-2016-2017-0001
)	
)	
Whole Foods Market Group, Inc.,	)	Proceeding Under Section 3008(a) of the
Whole Foods Market California, Inc.,	)	Resource Conservation and Recovery Act,
Mrs. Gooch's Natural Food Markets, Inc.,	)	42 U.S.C. § 6928(a)
Whole Foods Market Pacific Northwest, Inc.,)	
Whole Foods Market Rocky Mountain/ Southwest, L.P.,)	
WFM Northern Nevada, Inc.,)	
WFM Southern Nevada, Inc.,)	
WFM Hawaii, LLC,	+)	
WFM Kansas, LLC, and)	
WFM-WO, Inc.,)	
Nature's Heartland, Inc.,)	
WFM Nebraska, LLC, and)	
Whole Foods Market Lusher Court)	
Frisco CO, LLC)	
RESPONDENTS.)	

CONSENT AGREEMENT AND FINAL ORDER

I. PRELIMINARY STATEMENT

1. Complainant, the United States Environmental Protection Agency ("EPA"), and Respondents, Whole Foods Market Group, Inc., a Delaware corporation, Whole Foods Market California, Inc., a California corporation, Mrs. Gooch's Natural Food Markets, Inc., a California corporation, Whole Foods Market Pacific Northwest, Inc., a Delaware Corporation, Whole Foods Market Rocky Mountain/Southwest, L.P., a Texas limited partnership, WFM Northern Nevada, Inc., a Delaware Corporation, WFM Southern Nevada, Inc., a Delaware Corporation, WFM Hawaii, LLC, a Hawaii limited liability company, WFM

Kansas, LLC, a Kansas limited liability company, and ~~WFM-WO, Inc., a Delaware corporation~~ WFM-WO, Inc., a Delaware corporation, Nature's Heartland, Inc., a Massachusetts corporation, WFM Nebraska, LLC, a Delaware limited liability company, and Whole Foods Market Lusher Court Frisco CO, LLC a Delaware limited liability company (collectively the "Respondents" or "Whole Foods Market"), hereby enter into this Consent Agreement ("Agreement" or "Consent Agreement"), and the attached proposed Final Order (collectively, the "CAFO") before taking testimony and without adjudication of any issues of fact or law herein.

2. Complainant and Respondents, having conferred for the purposes of settlement pursuant to the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Consolidated Rules"), 40 C.F.R. § 22.18, and expressing a mutual desire to enter into a global agreement covering the Whole Foods Market Stores identified in Appendix A of this CAFO, which is attached hereto and incorporated by reference herein, have agreed to the execution of this CAFO. Respondents hereby agree to comply with the terms of this CAFO.

3. For the purposes of this CAFO and in accordance with the specific requirements for settlement set forth in 40 C.F.R. § 22.18(b)(2):

- a. Respondents admit the jurisdictional allegations set forth in this CAFO;
- b. Respondents neither admit nor deny the factual allegations and legal conclusions contained in this CAFO;
- c. Respondents consent to the assessment and payment of the civil penalty in the amount and by the method set forth in this CAFO;
- d. Respondents consent to the terms and conditions specified in the compliance provisions set forth in this CAFO; and

e. Respondents consent to perform the Supplemental Environmental Project set forth in this CAFO.

4. The Respondents waive any right they may have to contest the allegations set forth in this CAFO and any right to appeal the proposed Final Order set forth herein. 40 C.F.R. § 22.18(b)(2). Respondents do not waive any claims or defenses Respondents have to the interpretation of this CAFO or its terms.

II. THE PARTIES

5. Gregory Sullivan, ~~Acting~~ Director, Waste and Chemical Enforcement Division, Office of Civil Enforcement, Office of Enforcement and Compliance Assurance, is authorized, by lawful delegation, to initiate and settle civil administrative actions brought pursuant to Section 3008(a) of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976 and the Hazardous and Solid Waste Amendments (“HSWA”) of 1984 (collectively, “RCRA”), 42 U.S.C. § 6928(a).

6. Respondents own and operate the Whole Foods Market Stores identified in Appendix A, as specified therein, of this CAFO.

III. JURISDICTION

7. The parties agree to the commencement and conclusion of this matter through the issuance of this CAFO, which is authorized pursuant to Section 3008(a) of RCRA, 42 U.S.C. § 6928(a) and the Consolidated Rules, 40 C.F.R. §§ 22.13(b) and 22.18(b)(2) and (3).

8. RCRA Subtitle C (42 U.S.C. § 6921 *et seq.*) and its implementing regulations, set forth in 40 C.F.R. Parts 260-279, comprise EPA’s RCRA hazardous waste program. Section 3006(b) of RCRA, 42 U.S.C. § 6926(b), allows the Administrator to authorize a state to administer its own hazardous waste program in lieu of the federal program when the Administrator finds that

the state program meets certain conditions.¹ A violation of a state provision authorized pursuant to Section 3006 of RCRA, 42 U.S.C. § 6926, constitutes a violation of a requirement of Subtitle C, and is subject to the assessment of civil penalties and issuance of compliance orders by EPA as provided by Section 3008(a) of RCRA, 42 U.S.C. § 6928(a).

9. Pursuant to RCRA Section 3008(a)(2), 42 U.S.C. § 6928(a)(2), notice of the commencement of this action has been given to all Affected States and Territories.

IV. DEFINITIONS

10. Unless otherwise expressly provided herein, terms used in the CAFO that are defined in RCRA, 42 U.S.C. §§ 6901 *et seq.*, or in regulations promulgated under RCRA, 40 C.F.R. Parts 260-279, or in a state's authorized hazardous waste program, shall have the same meaning in this CAFO as such term has under RCRA or under federal or applicable authorized state regulations. In the case of a conflict between federal and state definitions, federal definitions shall control. Whenever terms defined below are used in this CAFO, such definitions shall apply:

- a. "Affected State and Territory" means a state or territory of the United States in which a Whole Foods Market Store is located as identified in Appendix A of this CAFO. Oklahoma, Texas, Louisiana, New Mexico, and Arkansas are not Affected States for purposes of this CAFO.
- b. "Business Day" means any day other than Saturday, Sunday, or a federal or legal holiday.

¹ Each of the Affected States and Territories described herein, with the exception of Iowa, have received authorization to administer the base RCRA hazardous waste program (requirements imposed by the Solid Waste Disposal Act prior to the Hazardous and Solid Waste Amendments of 1984) in lieu of the federal government's program. Not all the Affected States and Territories described herein are authorized to administer the Universal Waste regulations at 40 C.F.R. Part 273. Thus, where applicable, citations to the Code of Federal Regulations is a citation to the corresponding regulations contained within the Affected State's or Territory's authorized RCRA hazardous waste program.

- c. "Conditionally Exempt Small Quantity Generator" means a facility that generates 100 kg of hazardous waste or less in a calendar month.
- d. "Confidential Business Information" or "CBI" shall have the same definition as in 40 C.F.R. §§ 2.201-2.406~~311~~.
- e. "Consent Agreement and Final Order" or "CAFO" shall mean this Consent Agreement and attached Final Order and all Appendices hereto. In the event of conflict between this Consent Agreement and any Appendix, this Consent Agreement shall control.
- f. "Consumer Products" shall mean any merchandise sold by Respondents at Whole Foods Market Stores, which if discarded, may have to be managed as RCRA hazardous waste.
- g. "Day" means a calendar day unless expressly stated to be a business day. In computing any period of time under this CAFO, where the last day would fall on a Saturday, Sunday, or federal, legal or Affected State or Territory holiday, the period shall run until the close of business of the next business day.
- h. "Effective Date" is defined in Section VIII of this CAFO.
- i. "EPA" means the United States Environmental Protection Agency.
- ~~j. "Global-Level" shall mean any change to this CAFO's Appendices B through E instituted and/or approved by Whole Foods Market's Global Legal Team.~~
- ~~j-k~~ "Large Quantity Generator" means a facility that generates 1000 kg or more of hazardous waste in a calendar month.
- ~~k-l~~ "Notify" and "Submit" and other terms signifying an obligation to transmit or communicate documents and information mean to deliver in person, send via electronic mail, deposit in the U.S. mail or dispatch by express courier so that such transmission

or communication arrives to the designated recipient by close of business on the day required by this CAFO. If that required day is not a Business Day then the delivery, deposit, or dispatch shall be made by the close of business the next Business Day.

~~h.m.~~ “Paragraph” shall mean a portion of this CAFO identified by an arabic numeral and, in some cases, an associated lower case letter.

~~h.n.~~ “Parties” shall mean Complainant and all Respondents.

~~h.o.~~ “RCRA” means the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 *et seq.*

~~h.p.~~ “Respondents” mean the entities described in Paragraphs 1 and 6 of this CAFO.

~~h.q.~~ “Retail Associate” means a Whole Foods Market Store employee, including store leadership and team members.

~~h.r.~~ “Section” shall mean a portion of this CAFO identified by a roman numeral.

~~h.s.~~ “Small Quantity Generator” means a facility that generates more than 100 kg and less than 1000 kg of hazardous waste in a calendar month.

~~h.t.~~ “Small Quantity Handler of Universal Waste” means a generator of universal waste that does not accumulate 5,000 kilograms or more of universal waste (e.g., batteries, mercury-containing equipment, or fluorescent lamps, calculated collectively) at any time. 40 C.F.R. § 273.9.

~~h.u.~~ “Solid Waste” means any discarded material that is not excluded under 40 C.F.R. § 261.4(a) or that is not excluded by variance granted under §§ 260.30 and 260.31.

~~h.v.~~ “Stores,” “Facilities,” or “Whole Foods Market Stores” mean Whole Foods Market retail grocery stores, or any future Whole Foods Market retail grocery store (including

“365 by Whole Foods Market” stores), located in the United States (including Puerto Rico and other U.S. territories).

~~W~~ “United States” means the United States of America, and all of its departments, agencies, and instrumentalities.

~~W~~ “Universal Waste” means certain hazardous wastes that are subject to the universal waste requirements of 40 C.F.R. Part 273, including fluorescent lamps. 40 C.F.R. §§ 273.1 and 273.9.

V. EPA ALLEGATIONS AND DETERMINATIONS

11. Each Respondent is a “person” as defined in Section 1004(15) of RCRA, 42 U.S.C. § 6903(15) and 40 C.F.R. § 260.10.

12. Respondents own and operate the Stores identified in Appendix A, as specified therein, of this CAFO. The stores identified in Appendix A are “facilities” within the meaning of 40 C.F.R. § 260.10.

13. Respondents sell Consumer Products, some of which may become “solid waste” when they are returned, expired, spill or are in a condition such that they cannot be used for their intended purpose.

14. Some of the Consumer Products that become solid waste may be considered hazardous waste under federal or state law by having the characteristic of ignitability (D001), corrosivity (D002), or toxicity (D007, D010, D009, and D011).

15. Most, if not all, Whole Foods Market Stores generate 100 kilograms (“kg”) of hazardous waste or less in any given month, and therefore, are considered Conditionally Exempt Small Quantity Generators (“CESQGs”) pursuant to 40 C.F.R. § 261.5. As CESQGs, the Stores are exempt from regulation under the hazardous waste generator requirements at 40 C.F.R. Part

262 and the notification requirements of RCRA Section 3010 in any given month, provided that the requirements in 40 C.F.R. § 261.5 are met.

16. Between August 2014 and August 2015, EPA Region 6 conducted an investigation of Whole Food Company, Inc. and Respondent Whole Foods Market Rocky Mountain/Southwest, L.P.'s Stores located in Texas, Oklahoma, New Mexico, Louisiana and Arkansas (the "Investigation"). From the Investigation, EPA Region 6 concluded that a sufficient hazardous waste determination was not consistently made on all solid waste streams as required by 40 C.F.R. § 262.11(c), and one or more of the universal waste requirements set forth in 40 C.F.R. §§ 273.13 through 273.16 were not consistently complied with.

17. As a result of the Investigation, EPA Region 6, Whole Food Company, Inc. and Respondent Whole Foods Market Rocky Mountain/Southwest, L.P. entered into consent agreements and final orders for the Stores located within EPA Region 6's jurisdiction (the "Region 6 CAFOs").

18. Following the Investigation and Region 6 CAFOs, Respondents voluntarily contacted EPA and the Parties engaged in discussions that led to them agreeing to enter into a similar settlement agreement for Stores located in the Affected States and Territories, other than those covered by the Region 6 CAFOs. As part of the settlement discussions, Respondents informed EPA that there were no spills, leaks or releases at or from Respondents' Facilities, nor has EPA identified any such spills, leaks or releases.

19. The Parties' discussions have resulted in the agreement contained herein, which includes implementation of an enhanced hazardous waste management system in all of Respondents' Stores. This enhanced hazardous waste management system is designed to ensure the proper management of hazardous wastes at all Whole Foods Market Stores, and in many

respects goes beyond the minimum requirements necessary for compliance with the applicable federal and state hazardous waste laws and regulations. This program is more fully described in Paragraphs 27 through 29 of this CAFO and Appendices B through E.

20. Respondents have already taken steps toward implementing their enhanced hazardous waste management program, prior to the Effective Date of this CAFO.

Hazardous Waste Determinations

21. Pursuant to 40 C.F.R. § 262.11, a person who generates a solid waste is required to determine if that waste is hazardous.

22. Based upon the terms of the Region 6 CAFOs, and without a nationwide investigation, or any admission of liability or guilt by Respondents, EPA has concluded that Respondents did not make sufficient hazardous waste determinations at all Whole Foods Market Stores as required by 40 C.F.R. § 262.11.

Universal Waste Management

23. Pursuant to 40 C.F.R. § 273.10, a small quantity handler of universal waste must comply with the applicable requirements at 40 C.F.R. §§ 273.10 through 273.20.

24. Based upon the terms of the Region 6 CAFOs, and without a nationwide investigation, or any admission of liability or guilt by Respondents, EPA has concluded that Respondents did not sufficiently comply with some of the standards set forth in 40 C.F.R. §§ 273.13 through 273.16 at all Whole Foods Market Stores.

VI. TERMS OF SETTLEMENT

25. Based on the foregoing, the Parties agree to the entry of this Consent Agreement on the terms set forth herein.

A. Compliance Provisions

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26. Although a majority of Whole Foods Market Stores may qualify as CESQGs in any given month, pursuant to 40 C.F.R. § 261.5, the enhanced hazardous waste management program implemented by Respondents at Whole Foods Market Stores, as referenced in Paragraphs 27 through 29 and Appendices B through E of this CAFO, generally seeks to satisfy the hazardous waste generator requirements applicable to Small Quantity Generators (“SQGs”) and, therefore, goes above and beyond the minimum requirements applicable under the law.

27. As a condition of settlement, Respondents agree to implement the following measures as part of their enhanced hazardous waste management program:

- a. If applicable, Respondents shall obtain an EPA identification number for a Whole Foods Market Store pursuant to 40 C.F.R. § 262.12.
- b. Respondents must make a hazardous waste determination on all solid waste generated in its Stores pursuant to 40 C.F.R. § 262.11. As a means of complying with this requirement, Respondents have implemented, and will continue to implement Regional and/or State-specific hazardous waste determination guidance charts. These Regional and/or State-specific hazardous waste determination guidance charts are described and set forth in Appendix B of this CAFO. These charts are marked as and considered Confidential Business Information pursuant to 40 C.F.R. Part 2.
- c. To the extent Consumer Products become hazardous waste, Respondents have implemented, and will continue to implement a system to properly accumulate and store hazardous waste on-site, including, but not limited to, inspections and management of containers. This system, commonly referred to as the “bucket” or

“tote” system, accumulates and stores hazardous waste until it is picked up by a licensed hazardous waste hauler for proper off-site transport and disposal. Under this system, Respondents maintain records, such as manifests, to demonstrate proper off-site transport and disposal at their Stores. The “bucket” or “tote” system and the associated quick-reference materials for Retail Associates are further described and set forth in Appendix C of this CAFO. This system is marked as and considered Confidential Business Information pursuant to 40 C.F.R. Part 2.

- d. Respondents have implemented, and will continue to implement hazardous waste management trainings at its Stores for all Retail Associates. The hazardous waste management training materials for Retail Associates are further described in Appendix D of this CAFO. The training materials are marked as and considered Confidential Business Information pursuant to 40 C.F.R. Part 2.

28. Respondents shall continue their efforts to implement an electronic hazardous waste identification system as follows:

- a. Respondents will consult a third-party to review the Consumer Products at its Stores, and determine whether those Consumer Products, if discarded, would become hazardous waste pursuant to federal and state law and regulations.
- b. After the potentially hazardous items are identified, Whole Foods Market shall implement the electronic hazardous waste identification system to the maximum extent that Whole Foods Market determines it is operationally and technologically feasible. The third-party consultant or other qualified personnel will load the information into Respondents’ electronic hazardous waste identification system for use at Whole Foods Market Stores in identifying and classifying all solid waste

streams, which may include the use of hand-held scanners, in-store computer terminal, or other computer-based system(s).

29. In order to assist its Stores in implementing Respondents' enhanced hazardous waste management program described in Paragraph 27 of this CAFO, Respondents will develop and implement standard operating procedures ("SOPs") for use by Retail Associates at their Stores. These SOPs will be available and accessible to Retail Associates. These procedures are further described in Appendix E of this CAFO. The SOPs are marked as and considered Confidential Business Information pursuant to 40 C.F.R. Part 2.

30. No later than March 31, 2018, and annually thereafter until termination of this CAFO, Respondents must submit an annual report to EPA for the preceding calendar year that shall include: implementation progress of its electronic hazardous waste identification system described in Paragraph 28, including a description of the technology used for the system, and any other Global-Level² revisions to the Appendices B through E of this CAFO. These annual reports will be marked as and considered Confidential Business Information pursuant to 40 C.F.R. Part 2.

31. Respondents' third party audit procedures are further described in Appendix F of this CAFO. The Third Party Audit procedures are marked as and considered Confidential Business Information pursuant to 40 C.F.R. Part 2.

32. In all instances in which this CAFO requires written submission to EPA, each submission must be signed by a responsible corporate officer of Whole Foods Market and include the following certification:

I certify under penalty of law that I have personally examined and am familiar with the information submitted in this document and all documents submitted herewith; and that, to the best of my knowledge and belief, the submitted information is true, accurate, and

² "Global-Level" shall be defined as any change to this CAFO's Appendices instituted and/or approved by Whole Foods Market's Global Legal Team.

complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine or imprisonment.

B. Civil Penalty

33. Respondents agree to pay a civil penalty in the sum of \$500,000.00 within thirty (30) days of the Effective Date of this CAFO.

34. Respondents must pay the assessed civil penalty by either cashier's check, certified check, or wire transfer, made payable to: **Treasurer, United States of America**. Payment must be remitted in one of three (3) ways: regular U.S. Postal mail (including certified mail), overnight mail, or wire transfer. For regular U.S. Postal mail, U.S. Postal Service certified mail, or U.S. Postal Service express mail, the check should be remitted to:

United States Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, Missouri 63197-9000

For overnight mail (non-U.S. Postal Service, e.g. Fed Ex), the check should be remitted to:

U.S. Bank
Government Lockbox 979077
U.S. EPA Fines and Penalties
1005 Convention Plaza
SL-MO-C2-GL
St. Louis, Missouri 63101
Phone No. (314) 425-1818

For wire transfer, the payment should be remitted to:

Federal Reserve Bank of New York
ABA Routing Number: 021030004
Account Number: 68010727
SWIFT address: FRNYUS33
33 Liberty Street
New York, NY 10045
Field Tag 4200 of the Fedwire message should read: "D 68010727 Environmental Protection Agency"

The case name and document number (In the Matter of Whole Foods Market Group, Inc., et. al.,
Docket No. RCRA-HQ-2016-~~_____~~2017-0001) must be clearly documented on or within
Respondents' chosen method of payment to ensure proper credit.

35. Respondents shall submit a copy of the payment to the following addresses:

U.S. Environmental Protection Agency
Clerk of the Board
Environmental Appeals Board
~~Ariel Rios Building~~
1200 Pennsylvania Avenue, N.W. (MC 1103M)
Washington, D.C. 20460-0001

Laura Welles, Attorney-Advisor
Waste and Chemical Enforcement Division
Office of Civil Enforcement
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W. (MC 2249A)
Washington, D.C. 20460

36. Penalties paid pursuant to this CAFO are not deductible for federal purposes under
26 U.S.C. § 162(f).

37. Pursuant to 31 U.S.C. § 3717 and 40 C.F.R. § 13.11, unless otherwise prohibited
by law, EPA will assess interest and late payment penalties on debts owed to the United States and
a charge to cover the costs of processing and handling the delinquent claim. Interest on the civil
penalty assessed in this CAFO will begin to accrue thirty (30) days after the ~~effective date~~Effective
Date of the CAFO and will be recovered by EPA on any amount of the civil penalty that is not
paid by the respective due date. In accordance with 31 U.S.C. § 3717 and 40 C.F.R. § 13.11,
Respondents must pay the following amounts on any amount overdue:

- a. Interest. Any unpaid portion of a civil penalty must bear interest at the rate
established by the Secretary of the Treasury pursuant to 31 U.S.C. § 3717(a)(1).
Interest will therefore begin to accrue on a civil penalty or stipulated penalty if it is

not paid by the last date required. Interest will be assessed at the rate of the United States Treasury tax and loan rate in accordance with 40 C.F.R. § 13.11(a).

- b. Monthly Handling Charge. Respondents must pay a late payment handling charge of fifteen (\$15.00) on any late payment, with an additional charge of \$15.00 for each subsequent thirty (30) day period over which an unpaid balance remains.
- c. Non-payment Penalty. On any portion of a civil penalty more than ninety (90) days past due, Respondents must pay a non-payment penalty charge of six percent (6%) per annum, which will accrue from the date the penalty payment became due and is not paid. 40 C.F.R. § 13.11(c). This non-payment penalty charge is in addition to charges which accrue or may accrue under subparagraphs (a) and (b).

C. Supplemental Environmental Project

38. [Terms TBD]

38. Respondents shall implement the Supplemental Environmental Project in Appendix G of this CAFO.

D. Delay in Performance/Stipulated Penalties

39. Upon written notice of an alleged violation of the requirements set forth in Section VI.C. (Supplemental Environmental Project) of this CAFO or of the applicable federal hazardous waste regulations set forth in 40 Code of Federal Regulations Parts 260-279, Respondents shall have nine (9) days to cure the alleged violation. In the event Respondents fail to cure the alleged violation within the nine (9) day time period, Respondents shall be liable for stipulated penalties to the EPA, as specified below.

Period of Failure to Comply	Penalty Per Violation Per Day
10th through 20 th day	\$100.00
21st through 30 th day	\$250.00
Greater than 30 days	\$500.00

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40. Payment of stipulated penalties will not alter in any way Whole Foods Market's obligation to comply with the requirements of this CAFO.

VII. DISPUTE RESOLUTION

41. The dispute resolution procedures set forth in this Section shall be the exclusive mechanism to resolve any disputes arising under or with respect to this CAFO.

42. The Parties agree to meet and confer informally and in good faith to resolve all disputes arising from this CAFO. If Respondents disagree, in whole or in part, with any decision by EPA regarding this CAFO, Respondents agree to notify EPA, through the Chief of the Waste Enforcement Branch, and the Parties agree to use best efforts to informally and in good faith resolve their dispute. If EPA disagrees, in whole or in part, with any action or inaction taken by a Respondent under this CAFO, EPA agrees to notify Respondent, and the Parties agree to use their best efforts to informally and in good faith resolve their dispute within thirty (30) days. If the Parties are unable to resolve their dispute informally, and both the Parties agree they have reached an impasse, they shall submit the dispute to a neutral third party mediator selected and agreed upon by the Parties and the Parties shall participate in non-binding mediation consistent with 40 C.F.R. 22.18(d).

VIII. OTHER MATTERS

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43. Nothing in this CAFO shall relieve Respondents of the duty to comply with all applicable provisions of RCRA and any other federal, state, or local laws and regulations.

44. Notwithstanding any other provision of this CAFO, nothing in this CAFO shall be construed to limit the authority of the EPA to take any action against Respondents to address conditions that may present an imminent and substantial endangerment to human health or the environment. Complainant reserves the right to take enforcement action against Respondents for any future violations of RCRA and the implementing regulations and to enforce the terms and conditions of this CAFO.

45. EPA and Respondents agree that Respondents' have no obligations under this Consent Agreement should it be rejected by the Environmental Appeals Board (the "EAB"); provided, however, that in the event that the EAB expresses any objections to, or its intent to reject this Consent Agreement, the Parties agree that they shall exercise their mutual best efforts to address and resolve the EAB's objections. The ~~parties~~Parties shall have the right to withdraw from this CAFO in the event they are unable to reach agreement on the EAB's proposed changes or objections.

46. This CAFO may be amended or modified only by written agreement executed by both the EPA and each Respondent.

47. The terms of this CAFO binds the Parties and their successors and assigns.

48. The undersigned representative of each party to this CAFO certifies that each is duly authorized by the party whom he or she represents to enter into these terms and conditions and to legally bind that party to it.

49. Unless otherwise specified herein, whenever notice is required to be given, whenever a report or other document is required to be forwarded by one party to another, or whenever a submission or demonstration is required to be made, it must be directed to the individuals specified below at the addresses given, unless these individuals or their successors give notice in writing to the other parties that another individual has been designated to receive the communication:

Complainant:

Chief, Waste Enforcement Branch
Waste and Chemical Enforcement Division
Office of Civil Enforcement
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W. (MC 2249A)
Washington, D.C. 20460

Respondents:

Whole Foods Market Central Office
Attn: John H. Hempfling II
550 Bowie Street
Austin, TX 78703

With copy to:

King Williams LLP
Attn: Jennifer Hartman King
520 Capitol Mall, Ste 750
Sacramento, CA 95814

50. At such time as the Respondents believe they have completed all of the requirements of this CAFO, Respondents shall so certify in writing and in accordance with the certification language set forth in Paragraph 32. Within sixty (60) days of EPA's receipt of Respondents' certification, EPA shall notify Respondents in writing whether EPA agrees that Respondents have completed all requirements, or if EPA does not agree it shall identify the basis for its position. If EPA does not agree with Whole Foods Market's certification, Whole Foods

Market shall address the matters identified in EPA's objection, and may thereafter recertify completion of the CAFO. Upon notification by EPA that it agrees with Respondents' certification, or if EPA does not respond within sixty (60) days, Respondents' liability for federal civil penalties only is resolved for the violations alleged in Section V (EPA Allegations and Determinations) of this CAFO. This CAFO does not affect the right of EPA or the United States from taking action as provided by 40 C.F.R. 22.18(c).

51. The headings in this CAFO are for convenience of reference only and shall not affect the interpretation of this CAFO.

52. The Parties to this CAFO shall bear their own costs and attorneys' fees in this matter.

53. This CAFO and the attached proposed Final Order shall become effective upon execution of the Final Order by EAB and filing with the Clerk of the EAB ("Effective Date"). 40 C.F.R. §§ 22.18(b)(2) and 22.31(b).

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AGREED AND CONSENTED TO:

FOR COMPLAINANT:

Date: _____

GregGregory Sullivan, Acting Director
Waste and Chemical Enforcement Division
Office of Civil Enforcement
Office of Enforcement and Compliance Assurance
United States Environmental Protection Agency

Date: _____

Laura Welles, Attorney Advisor
(Counsel for Complainant)
Waste and Chemical Enforcement Division
Office of Civil Enforcement
Office of Enforcement and Compliance Assurance
United States Environmental Protection Agency

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FOR RESPONDENT WHOLE FOODS MARKET GROUP, INC.:

Date: _____

FOR RESPONDENT WHOLE FOODS MARKET CALIFORNIA, INC.:

Date: _____

FOR RESPONDENT MRS. GOOCH'S FOOD MARKETS, INC.:

Date: _____

FOR RESPONDENT WHOLE FOODS MARKET PACIFIC NORTHWEST, INC.:

Date: _____

FOR RESPONDENT WHOLE FOODS MARKET ROCKY MOUNTAIN/SOUTHWEST, L.P.:

Date: _____

FOR RESPONDENT WFM NORTHERN NEVADA, INC.:

Date: _____

FOR RESPONDENT WFM SOUTHERN NEVADA, INC.:

Date: _____

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FOR RESPONDENT WFM HAWAII, LLC:

Date: _____

FOR RESPONDENT WFM KANSAS, LLC:

Date: _____

FOR RESPONDENT WFM-WO, INC.:

Date: _____

FOR RESPONDENT NATURE'S HEARTLAND, INC.:

Date:

FOR RESPONDENT WFM NEBRASKA, LLC:

Date:

FOR RESPONDENT WHOLE FOODS MARKET LUSHER COURT FRISCO CO, LLC:

Date:

**BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.**

IN THE MATTER OF:	)	EPA Docket No.
	)	RCRA-HQ-2017-0001
)	
)	
Whole Foods Market Group, Inc.,	)	Proceeding Under Section 3008(a) of the
Whole Foods Market California, Inc.,	)	Resource Conservation and Recovery Act,
Mrs. Gooch's Natural Food Markets, Inc.,	)	42 U.S.C. § 6928(a)
Whole Foods Market Pacific Northwest, Inc.,)	
Whole Foods Market Rocky Mountain/ Southwest, L.P.,)	
WFM Northern Nevada, Inc.,)	
WFM Southern Nevada, Inc.,)	
WFM Hawaii, LLC,)	
WFM Kansas, LLC,)	
WFM-WO, Inc.,)	
Nature's Heartland, Inc.,)	
WFM Nebraska, LLC, and)	
Whole Foods Market Lusher Court Frisco CO, LLC)	
)	
RESPONDENTS.)	

CONSENT AGREEMENT AND FINAL ORDER

I. PRELIMINARY STATEMENT

1. Complainant, the United States Environmental Protection Agency ("EPA"), and Respondents, Whole Foods Market Group, Inc., a Delaware corporation, Whole Foods Market California, Inc., a California corporation, Mrs. Gooch's Natural Food Markets, Inc., a California corporation, Whole Foods Market Pacific Northwest, Inc., a Delaware corporation, Whole Foods Market Rocky Mountain/Southwest, L.P., a Texas limited partnership, WFM Northern Nevada, Inc., a Delaware corporation, WFM Southern Nevada, Inc., a Delaware corporation, WFM Hawaii, LLC, a Hawaii limited liability company, WFM Kansas, LLC, a Kansas limited liability company,

WFM-WO, Inc., a Delaware corporation, Nature's Heartland, Inc., a Massachusetts corporation, WFM Nebraska, LLC, a Delaware limited liability company, and Whole Foods Market Lusher Court Frisco CO, LLC a Delaware limited liability company (collectively the "Respondents" or "Whole Foods Market"), hereby enter into this Consent Agreement ("Agreement" or "Consent Agreement"), and the attached proposed Final Order (collectively, the "CAFO") before taking testimony and without adjudication of any issues of fact or law herein.

2. Complainant and Respondents, having conferred for the purposes of settlement pursuant to the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Consolidated Rules"), 40 C.F.R. § 22.18, and expressing a mutual desire to enter into a global agreement covering the Whole Foods Market Stores identified in Appendix A of this CAFO, which is attached hereto and incorporated by reference herein, have agreed to the execution of this CAFO. Respondents hereby agree to comply with the terms of this CAFO.

3. For the purposes of this CAFO and in accordance with the specific requirements for settlement set forth in 40 C.F.R. § 22.18(b)(2):

- a. Respondents admit the jurisdictional allegations set forth in this CAFO;
- b. Respondents neither admit nor deny the factual allegations and legal conclusions contained in this CAFO;
- c. Respondents consent to the assessment and payment of the civil penalty in the amount and by the method set forth in this CAFO;
- d. Respondents consent to the terms and conditions specified in the compliance provisions set forth in this CAFO; and

- e. Respondents consent to perform the Supplemental Environmental Project set forth in this CAFO.

4. The Respondents waive any right they may have to contest the allegations set forth in this CAFO and any right to appeal the proposed Final Order set forth herein. 40 C.F.R. § 22.18(b)(2). Respondents do not waive any claims or defenses Respondents have to the interpretation of this CAFO or its terms.

II. THE PARTIES

5. Gregory Sullivan, Director, Waste and Chemical Enforcement Division, Office of Civil Enforcement, Office of Enforcement and Compliance Assurance, is authorized, by lawful delegation, to initiate and settle civil administrative actions brought pursuant to Section 3008(a) of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976 and the Hazardous and Solid Waste Amendments (“HSWA”) of 1984 (collectively, “RCRA”), 42 U.S.C. § 6928(a).

6. Respondents own and operate the Whole Foods Market Stores identified in Appendix A, as specified therein, of this CAFO.

III. JURISDICTION

7. The parties agree to the commencement and conclusion of this matter through the issuance of this CAFO, which is authorized pursuant to Section 3008(a) of RCRA, 42 U.S.C. § 6928(a) and the Consolidated Rules, 40 C.F.R. §§ 22.13(b) and 22.18(b)(2) and (3).

8. RCRA Subtitle C (42 U.S.C. § 6921 *et seq.*) and its implementing regulations, set forth in 40 C.F.R. Parts 260-279, comprise EPA’s RCRA hazardous waste program. Section 3006(b) of RCRA, 42 U.S.C. § 6926(b), allows the Administrator to authorize a state to administer its own hazardous waste program in lieu of the federal program when the Administrator finds that

the state program meets certain conditions.¹ A violation of a state provision authorized pursuant to Section 3006 of RCRA, 42 U.S.C. § 6926, constitutes a violation of a requirement of Subtitle C, and is subject to the assessment of civil penalties and issuance of compliance orders by EPA as provided by Section 3008(a) of RCRA, 42 U.S.C. § 6928(a).

9. Pursuant to RCRA Section 3008(a)(2), 42 U.S.C. § 6928(a)(2), notice of the commencement of this action has been given to all Affected States and Territories.

IV. DEFINITIONS

10. Unless otherwise expressly provided herein, terms used in the CAFO that are defined in RCRA, 42 U.S.C. §§ 6901 *et seq.*, or in regulations promulgated under RCRA, 40 C.F.R. Parts 260-279, or in a state's authorized hazardous waste program, shall have the same meaning in this CAFO as such term has under RCRA or under federal or applicable authorized state regulations. In the case of a conflict between federal and state definitions, federal definitions shall control. Whenever terms defined below are used in this CAFO, such definitions shall apply:

- a. "Affected State and Territory" means a state or territory of the United States in which a Whole Foods Market Store is located as identified in Appendix A of this CAFO. Oklahoma, Texas, Louisiana, New Mexico, and Arkansas are not Affected States for purposes of this CAFO.
- b. "Business Day" means any day other than Saturday, Sunday, or a federal or legal holiday.

¹ Each of the Affected States and Territories described herein, with the exception of Iowa, have received authorization to administer the base RCRA hazardous waste program (requirements imposed by the Solid Waste Disposal Act prior to the Hazardous and Solid Waste Amendments of 1984) in lieu of the federal government's program. Not all the Affected States and Territories described herein are authorized to administer the Universal Waste regulations at 40 C.F.R. Part 273. Thus, where applicable, citations to the Code of Federal Regulations is a citation to the corresponding regulations contained within the Affected State's or Territory's authorized RCRA hazardous waste program.

- c. “Conditionally Exempt Small Quantity Generator” means a facility that generates 100 kg of hazardous waste or less in a calendar month.
- d. “Confidential Business Information” or “CBI” shall have the same definition as in 40 C.F.R. §§ 2.201-2.311.
- e. “Consent Agreement and Final Order” or “CAFO” shall mean this Consent Agreement and attached Final Order and all Appendices hereto. In the event of conflict between this Consent Agreement and any Appendix, this Consent Agreement shall control.
- f. “Consumer Products” shall mean any merchandise sold by Respondents at Whole Foods Market Stores, which if discarded, may have to be managed as RCRA hazardous waste.
- g. “Day” means a calendar day unless expressly stated to be a business day. In computing any period of time under this CAFO, where the last day would fall on a Saturday, Sunday, or federal, legal or Affected State or Territory holiday, the period shall run until the close of business of the next business day.
- h. “Effective Date” is defined in Section VIII of this CAFO.
- i. “EPA” means the United States Environmental Protection Agency.
- j. “Global-Level” shall mean any change to this CAFO’s Appendices B through E instituted and/or approved by Whole Foods Market’s Global Legal Team.
- k. “Large Quantity Generator” means a facility that generates 1000 kg or more of hazardous waste in a calendar month.
- l. “Notify” and “Submit” and other terms signifying an obligation to transmit or communicate documents and information mean to deliver in person, send via electronic mail, deposit in the U.S. mail or dispatch by express courier so that such transmission

- or communication arrives to the designated recipient by close of business on the day required by this CAFO. If that required day is not a Business Day then the delivery, deposit, or dispatch shall be made by the close of business the next Business Day.
- m. "Paragraph" shall mean a portion of this CAFO identified by an arabic numeral and, in some cases, an associated lower case letter.
 - n. "Parties" shall mean Complainant and all Respondents.
 - o. "RCRA" means the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 *et seq.*
 - p. "Respondents" mean the entities described in Paragraphs 1 and 6 of this CAFO.
 - q. "Retail Associate" means a Whole Foods Market Store employee, including store leadership and team members.
 - r. "Section" shall mean a portion of this CAFO identified by a roman numeral.
 - s. "Small Quantity Generator" means a facility that generates more than 100 kg and less than 1000 kg of hazardous waste in a calendar month.
 - t. "Small Quantity Handler of Universal Waste" means a generator of universal waste that does not accumulate 5,000 kilograms or more of universal waste (e.g., batteries, mercury-containing equipment, or fluorescent lamps, calculated collectively) at any time. 40 C.F.R. § 273.9.
 - u. "Solid Waste" means any discarded material that is not excluded under 40 C.F.R. § 261.4(a) or that is not excluded by variance granted under §§ 260.30 and 260.31.
 - v. "Stores," "Facilities," or "Whole Foods Market Stores" mean Whole Foods Market retail grocery stores, or any future Whole Foods Market retail grocery store (including

“365 by Whole Foods Market” stores), located in the United States (including Puerto Rico and other U.S. territories).

- w. “United States” means the United States of America, and all of its departments, agencies, and instrumentalities.
- x. “Universal Waste” means certain hazardous wastes that are subject to the universal waste requirements of 40 C.F.R. Part 273, including fluorescent lamps. 40 C.F.R. §§ 273.1 and 273.9.

V. EPA ALLEGATIONS AND DETERMINATIONS

11. Each Respondent is a “person” as defined in Section 1004(15) of RCRA, 42 U.S.C. § 6903(15) and 40 C.F.R. § 260.10.

12. Respondents own and operate the Stores identified in Appendix A, as specified therein, of this CAFO. The stores identified in Appendix A are “facilities” within the meaning of 40 C.F.R. § 260.10.

13. Respondents sell Consumer Products, some of which may become “solid waste” when they are returned, expired, spill or are in a condition such that they cannot be used for their intended purpose.

14. Some of the Consumer Products that become solid waste may be considered hazardous waste under federal or state law by having the characteristic of ignitability (D001), corrosivity (D002), or toxicity (D007, D010, D009, and D011).

15. Most, if not all, Whole Foods Market Stores generate 100 kilograms (“kg”) of hazardous waste or less in any given month, and therefore, are considered Conditionally Exempt Small Quantity Generators (“CESQGs”) pursuant to 40 C.F.R. § 261.5. As CESQGs, the Stores are exempt from regulation under the hazardous waste generator requirements at 40 C.F.R. Part

262 and the notification requirements of RCRA Section 3010 in any given month, provided that the requirements in 40 C.F.R. § 261.5 are met.

16. Between August 2014 and August 2015, EPA Region 6 conducted an investigation of Whole Food Company, Inc. and Respondent Whole Foods Market Rocky Mountain/Southwest, L.P.'s Stores located in Texas, Oklahoma, New Mexico, Louisiana and Arkansas (the "Investigation"). From the Investigation, EPA Region 6 concluded that a sufficient hazardous waste determination was not consistently made on all solid waste streams as required by 40 C.F.R. § 262.11(c), and one or more of the universal waste requirements set forth in 40 C.F.R. §§ 273.13 through 273.16 were not consistently complied with.

17. As a result of the Investigation, EPA Region 6, Whole Food Company, Inc. and Respondent Whole Foods Market Rocky Mountain/Southwest, L.P. entered into consent agreements and final orders for the Stores located within EPA Region 6's jurisdiction (the "Region 6 CAFOs").

18. Following the Investigation and Region 6 CAFOs, Respondents voluntarily contacted EPA and the Parties engaged in discussions that led to them agreeing to enter into a similar settlement agreement for Stores located in the Affected States and Territories, other than those covered by the Region 6 CAFOs. As part of the settlement discussions, Respondents informed EPA that there were no spills, leaks or releases at or from Respondents' Facilities, nor has EPA identified any such spills, leaks or releases.

19. The Parties' discussions have resulted in the agreement contained herein, which includes implementation of an enhanced hazardous waste management system in all of Respondents' Stores. This enhanced hazardous waste management system is designed to ensure the proper management of hazardous wastes at all Whole Foods Market Stores, and in many

respects goes beyond the minimum requirements necessary for compliance with the applicable federal and state hazardous waste laws and regulations. This program is more fully described in Paragraphs 27 through 29 of this CAFO and Appendices B through E.

20. Respondents have already taken steps toward implementing their enhanced hazardous waste management program, prior to the Effective Date of this CAFO.

Hazardous Waste Determinations

21. Pursuant to 40 C.F.R. § 262.11, a person who generates a solid waste is required to determine if that waste is hazardous.

22. Based upon the terms of the Region 6 CAFOs, and without a nationwide investigation, or any admission of liability or guilt by Respondents, EPA has concluded that Respondents did not make sufficient hazardous waste determinations at all Whole Foods Market Stores as required by 40 C.F.R. § 262.11.

Universal Waste Management

23. Pursuant to 40 C.F.R. § 273.10, a small quantity handler of universal waste must comply with the applicable requirements at 40 C.F.R. §§ 273.10 through 273.20.

24. Based upon the terms of the Region 6 CAFOs, and without a nationwide investigation, or any admission of liability or guilt by Respondents, EPA has concluded that Respondents did not sufficiently comply with some of the standards set forth in 40 C.F.R. §§ 273.13 through 273.16 at all Whole Foods Market Stores.

VI. TERMS OF SETTLEMENT

25. Based on the foregoing, the Parties agree to the entry of this Consent Agreement on the terms set forth herein.

A. Compliance Provisions

26. Although a majority of Whole Foods Market Stores may qualify as CESQGs in any given month, pursuant to 40 C.F.R. § 261.5, the enhanced hazardous waste management program implemented by Respondents at Whole Foods Market Stores, as referenced in Paragraphs 27 through 29 and Appendices B through E of this CAFO, generally seeks to satisfy the hazardous waste generator requirements applicable to Small Quantity Generators (“SQGs”) and, therefore, goes above and beyond the minimum requirements applicable under the law.

27. As a condition of settlement, Respondents agree to implement the following measures as part of their enhanced hazardous waste management program:

- a. If applicable, Respondents shall obtain an EPA identification number for a Whole Foods Market Store pursuant to 40 C.F.R. § 262.12.
- b. Respondents must make a hazardous waste determination on all solid waste generated in its Stores pursuant to 40 C.F.R. § 262.11. As a means of complying with this requirement, Respondents have implemented, and will continue to implement Regional and/or State-specific hazardous waste determination guidance charts. These Regional and/or State-specific hazardous waste determination guidance charts are described and set forth in Appendix B of this CAFO. These charts are marked as and considered Confidential Business Information pursuant to 40 C.F.R. Part 2.
- c. To the extent Consumer Products become hazardous waste, Respondents have implemented, and will continue to implement a system to properly accumulate and store hazardous waste on-site, including, but not limited to, inspections and management of containers. This system, commonly referred to as the “bucket” or

“tote” system, accumulates and stores hazardous waste until it is picked up by a licensed hazardous waste hauler for proper off-site transport and disposal. Under this system, Respondents maintain records, such as manifests, to demonstrate proper off-site transport and disposal at their Stores. The “bucket” or “tote” system and the associated quick-reference materials for Retail Associates are further described and set forth in Appendix C of this CAFO. This system is marked as and considered Confidential Business Information pursuant to 40 C.F.R. Part 2.

- d. Respondents have implemented, and will continue to implement hazardous waste management trainings at its Stores for all Retail Associates. The hazardous waste management training materials for Retail Associates are further described in Appendix D of this CAFO. The training materials are marked as and considered Confidential Business Information pursuant to 40 C.F.R. Part 2.

28. Respondents shall continue their efforts to implement an electronic hazardous waste identification system as follows:

- a. Respondents will consult a third-party to review the Consumer Products at its Stores, and determine whether those Consumer Products, if discarded, would become hazardous waste pursuant to federal and state law and regulations.
- b. After the potentially hazardous items are identified, Whole Foods Market shall implement the electronic hazardous waste identification system to the maximum extent that Whole Foods Market determines it is operationally and technologically feasible. The third-party consultant or other qualified personnel will load the information into Respondents’ electronic hazardous waste identification system for use at Whole Foods Market Stores in identifying and classifying all solid waste

streams, which may include the use of hand-held scanners, in-store computer terminal, or other computer-based system(s).

29. In order to assist its Stores in implementing Respondents' enhanced hazardous waste management program described in Paragraph 27 of this CAFO, Respondents will develop and implement standard operating procedures ("SOPs") for use by Retail Associates at their Stores. These SOPs will be available and accessible to Retail Associates. These procedures are further described in Appendix E of this CAFO. The SOPs are marked as and considered Confidential Business Information pursuant to 40 C.F.R. Part 2.

30. No later than March 31, 2018, and annually thereafter until termination of this CAFO, Respondents must submit an annual report to EPA for the preceding calendar year that shall include: implementation progress of its electronic hazardous waste identification system described in Paragraph 28, including a description of the technology used for the system, and any other Global-Level revisions to Appendices B through E of this CAFO. These annual reports will be marked as and considered Confidential Business Information pursuant to 40 C.F.R. Part 2.

31. Respondents' third party audit procedures are further described in Appendix F of this CAFO. The Third Party Audit procedures are marked as and considered Confidential Business Information pursuant to 40 C.F.R. Part 2.

32. In all instances in which this CAFO requires written submission to EPA, each submission must be signed by a responsible corporate officer of Whole Foods Market and include the following certification:

I certify under penalty of law that I have personally examined and am familiar with the information submitted in this document and all documents submitted herewith; and that, to the best of my knowledge and belief, the submitted information is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine or imprisonment.

B. Civil Penalty

33. Respondents agree to pay a civil penalty in the sum of \$500,000.00 within thirty (30) days of the Effective Date of this CAFO.

34. Respondents must pay the assessed civil penalty by either cashier's check, certified check, or wire transfer, made payable to: **Treasurer, United States of America**. Payment must be remitted in one of three (3) ways: regular U.S. Postal mail (including certified mail), overnight mail, or wire transfer. For regular U.S. Postal mail, U.S. Postal Service certified mail, or U.S. Postal Service express mail, the check should be remitted to:

United States Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, Missouri 63197-9000

For overnight mail (non-U.S. Postal Service, e.g. Fed Ex), the check should be remitted to:

U.S. Bank
Government Lockbox 979077
U.S. EPA Fines and Penalties
1005 Convention Plaza
SL-MO-C2-GL
St. Louis, Missouri 63101
Phone No. (314) 425-1818

For wire transfer, the payment should be remitted to:

Federal Reserve Bank of New York
ABA Routing Number: 021030004
Account Number: 68010727
SWIFT address: FRNYUS33
33 Liberty Street
New York, NY 10045
Field Tag 4200 of the Fedwire message should read: "D 68010727 Environmental Protection Agency"

The case name and document number (In the Matter of Whole Foods Market Group, Inc., et. al., Docket No. RCRA-HQ-2017-0001) must be clearly documented on or within Respondents' chosen method of payment to ensure proper credit.

35. Respondents shall submit a copy of the payment to the following addresses:

U.S. Environmental Protection Agency
Clerk of the Board
Environmental Appeals Board
1200 Pennsylvania Avenue, N.W. (MC 1103M)
Washington, D.C. 20460-0001

Laura Welles, Attorney-Advisor
Waste and Chemical Enforcement Division
Office of Civil Enforcement
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W. (MC 2249A)
Washington, D.C. 20460

36. Penalties paid pursuant to this CAFO are not deductible for federal purposes under 26 U.S.C. § 162(f).

37. Pursuant to 31 U.S.C. § 3717 and 40 C.F.R. § 13.11, unless otherwise prohibited by law, EPA will assess interest and late payment penalties on debts owed to the United States and a charge to cover the costs of processing and handling the delinquent claim. Interest on the civil penalty assessed in this CAFO will begin to accrue thirty (30) days after the Effective Date of the CAFO and will be recovered by EPA on any amount of the civil penalty that is not paid by the respective due date. In accordance with 31 U.S.C. § 3717 and 40 C.F.R. § 13.11, Respondents must pay the following amounts on any amount overdue:

- a. Interest. Any unpaid portion of a civil penalty must bear interest at the rate established by the Secretary of the Treasury pursuant to 31 U.S.C. § 3717(a)(1). Interest will therefore begin to accrue on a civil penalty or stipulated penalty if it is

not paid by the last date required. Interest will be assessed at the rate of the United States Treasury tax and loan rate in accordance with 40 C.F.R. § 13.11(a).

- b. Monthly Handling Charge. Respondents must pay a late payment handling charge of fifteen (\$15.00) on any late payment, with an additional charge of \$15.00 for each subsequent thirty (30) day period over which an unpaid balance remains.
- c. Non-payment Penalty. On any portion of a civil penalty more than ninety (90) days past due, Respondents must pay a non-payment penalty charge of six percent (6%) per annum, which will accrue from the date the penalty payment became due and is not paid. 40 C.F.R. § 13.11(c). This non-payment penalty charge is in addition to charges which accrue or may accrue under subparagraphs (a) and (b).

C. Supplemental Environmental Project

38. Respondents shall implement the Supplemental Environmental Project in Appendix G of this CAFO.

D. Delay in Performance/Stipulated Penalties

39. Upon written notice of an alleged violation of the requirements set forth in Section VI.C. (Supplemental Environmental Project) of this CAFO or of the applicable federal hazardous waste regulations set forth in 40 Code of Federal Regulations Parts 260-279, Respondents shall have nine (9) days to cure the alleged violation. In the event Respondents fail to cure the alleged violation within the nine (9) day time period, Respondents shall be liable for stipulated penalties to the EPA, as specified below.

Period of Failure to Comply	Penalty Per Violation Per Day
10th through 20 th day	\$100.00
21st through 30 th day	\$250.00
Greater than 30 days	\$500.00

40. Payment of stipulated penalties will not alter in any way Whole Foods Market's obligation to comply with the requirements of this CAFO.

VII. DISPUTE RESOLUTION

41. The dispute resolution procedures set forth in this Section shall be the exclusive mechanism to resolve any disputes arising under or with respect to this CAFO.

42. The Parties agree to meet and confer informally and in good faith to resolve all disputes arising from this CAFO. If Respondents disagree, in whole or in part, with any decision by EPA regarding this CAFO, Respondents agree to notify EPA, through the Chief of the Waste Enforcement Branch, and the Parties agree to use best efforts to informally and in good faith resolve their dispute. If EPA disagrees, in whole or in part, with any action or inaction taken by a Respondent under this CAFO, EPA agrees to notify Respondent, and the Parties agree to use their best efforts to informally and in good faith resolve their dispute within thirty (30) days. If the Parties are unable to resolve their dispute informally, and the Parties agree they have reached an impasse, they shall submit the dispute to a neutral third party mediator selected and agreed upon by the Parties and the Parties shall participate in non-binding mediation consistent with 40 C.F.R. 22.18(d).

VIII. OTHER MATTERS

43. Nothing in this CAFO shall relieve Respondents of the duty to comply with all applicable provisions of RCRA and any other federal, state, or local laws and regulations.

44. Notwithstanding any other provision of this CAFO, nothing in this CAFO shall be construed to limit the authority of the EPA to take any action against Respondents to address conditions that may present an imminent and substantial endangerment to human health or the environment. Complainant reserves the right to take enforcement action against Respondents for any future violations of RCRA and the implementing regulations and to enforce the terms and conditions of this CAFO.

45. EPA and Respondents agree that Respondents' have no obligations under this Consent Agreement should it be rejected by the Environmental Appeals Board (the "EAB"); provided, however, that in the event that the EAB expresses any objections to, or its intent to reject this Consent Agreement, the Parties agree that they shall exercise their mutual best efforts to address and resolve the EAB's objections. The Parties shall have the right to withdraw from this CAFO in the event they are unable to reach agreement on the EAB's proposed changes or objections.

46. This CAFO may be amended or modified only by written agreement executed by both the EPA and each Respondent.

47. The terms of this CAFO binds the Parties and their successors and assigns.

48. The undersigned representative of each party to this CAFO certifies that each is duly authorized by the party whom he or she represents to enter into these terms and conditions and to legally bind that party to it.

49. Unless otherwise specified herein, whenever notice is required to be given, whenever a report or other document is required to be forwarded by one party to another, or whenever a submission or demonstration is required to be made, it must be directed to the individuals specified below at the addresses given, unless these individuals or their successors give notice in writing to the other parties that another individual has been designated to receive the communication:

Complainant:

Chief, Waste Enforcement Branch
Waste and Chemical Enforcement Division
Office of Civil Enforcement
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W. (MC 2249A)
Washington, D.C. 20460

Respondents:

Whole Foods Market Central Office
Attn: John H. Hempfling II
550 Bowie Street
Austin, TX 78703

With copy to:

King Williams LLP
Attn: Jennifer Hartman King
520 Capitol Mall, Ste 750
Sacramento, CA 95814

50. At such time as the Respondents believe they have completed all of the requirements of this CAFO, Respondents shall so certify in writing and in accordance with the certification language set forth in Paragraph 32. Within sixty (60) days of EPA's receipt of Respondents' certification, EPA shall notify Respondents in writing whether EPA agrees that Respondents have completed all requirements, or if EPA does not agree it shall identify the basis for its position. If EPA does not agree with Whole Foods Market's certification, Whole Foods

Market shall address the matters identified in EPA's objection, and may thereafter recertify completion of the CAFO. Upon notification by EPA that it agrees with Respondents' certification, or if EPA does not respond within sixty (60) days, Respondents' liability for federal civil penalties only is resolved for the violations alleged in Section V (EPA Allegations and Determinations) of this CAFO. This CAFO does not affect the right of EPA or the United States from taking action as provided by 40 C.F.R. 22.18(c).

51. The headings in this CAFO are for convenience of reference only and shall not affect the interpretation of this CAFO.

52. The Parties to this CAFO shall bear their own costs and attorneys' fees in this matter.

53. This CAFO and the attached proposed Final Order shall become effective upon execution of the Final Order by EAB and filing with the Clerk of the EAB ("Effective Date"). 40 C.F.R. §§ 22.18(b)(2) and 22.31(b).

AGREED AND CONSENTED TO:

FOR COMPLAINANT:

Date: _____

Gregory Sullivan, Director
Waste and Chemical Enforcement Division
Office of Civil Enforcement
Office of Enforcement and Compliance Assurance
United States Environmental Protection Agency

Date: _____

Laura Welles, Attorney-Advisor
Waste and Chemical Enforcement Division
Office of Civil Enforcement
Office of Enforcement and Compliance Assurance
United States Environmental Protection Agency

FOR RESPONDENT WHOLE FOODS MARKET GROUP, INC.:

Date: _____

FOR RESPONDENT WHOLE FOODS MARKET CALIFORNIA, INC.:

Date: _____

FOR RESPONDENT MRS. GOOCH'S FOOD MARKETS, INC.:

Date: _____

FOR RESPONDENT WHOLE FOODS MARKET PACIFIC NORTHWEST, INC.:

Date: _____

FOR RESPONDENT WHOLE FOODS MARKET ROCKY MOUNTAIN/SOUTHWEST, L.P.:

Date: _____

FOR RESPONDENT WFM NORTHERN NEVADA, INC.:

Date: _____

FOR RESPONDENT WFM SOUTHERN NEVADA, INC.:

Date: _____

FOR RESPONDENT WFM HAWAII, LLC:

Date: _____

FOR RESPONDENT WFM KANSAS, LLC:

Date: _____

FOR RESPONDENT WFM-WO, INC.:

Date: _____

FOR RESPONDENT NATURE'S HEARTLAND, INC.:

Date: _____

FOR RESPONDENT WFM NEBRASKA, LLC:

Date: _____

FOR RESPONDENT WHOLE FOODS MARKET LUSHER COURT FRISCO CO, LLC:

Date: _____

Message

From: Jennifer Hartman King [JHartmanKing@kingwilliamsllp.com]
Sent: 1/6/2017 5:16:59 AM
To: Fogarty, Johnpc [Fogarty.Johnpc@epa.gov]; Welles, Laura [Welles.Laura@epa.gov]
CC: John Hempfling (CE CEN) [John.Hempfling@wholefoods.com]
Subject: [CONFIDENTIAL SETTLEMENT COMMUNICATION] Appendix E
Attachments: USEPA CAFO Appendix E (00014284xD64DF).pdf

Jennifer Hartman King, Managing Partner



520 Capitol Mall, Suite 750
Sacramento, CA 95814
916-379-7530 – Main phone
916-379-7533 – Direct dial
916-379-7535 – Fax
Email: JHartmanKing@KingWilliamsLaw.com

Website: www.KingWilliamsLaw.com
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Message

From: Jennifer Hartman King [JHartmanKing@kingwilliamsllp.com]
Sent: 1/6/2017 5:16:07 AM
To: Fogarty, Johnpc [Fogarty.Johnpc@epa.gov]; Welles, Laura [Welles.Laura@epa.gov]
CC: John Hempfling (CE CEN) [John.Hempfling@wholefoods.com]
Subject: [CONFIDENTIAL SETTLEMENT COMMUNICATION] Appendix D
Attachments: USEPA CAFO Appendix D (00014295xD64DF).pdf

Jennifer Hartman King, Managing Partner



520 Capitol Mall, Suite 750
Sacramento, CA 95814
916-379-7530 – Main phone
916-379-7533 – Direct dial
916-379-7535 – Fax
Email: JHartmanKing@KingWilliamsLaw.com

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Message

From: Jennifer Hartman King [JHartmanKing@kingwilliamsllp.com]
Sent: 1/6/2017 5:15:20 AM
To: Fogarty, Johnpc [Fogarty.Johnpc@epa.gov]; Welles, Laura [Welles.Laura@epa.gov]
CC: John Hempfling (CE CEN) [John.Hempfling@wholefoods.com]
Subject: [CONFIDENTIAL SETTLEMENT COMMUNICATION] Appendix C
Attachments: USEPA CAFO Appendix C (00014294xD64DF).pdf

Jennifer Hartman King, Managing Partner



520 Capitol Mall, Suite 750
Sacramento, CA 95814
916-379-7530 – Main phone
916-379-7533 – Direct dial
916-379-7535 – Fax
Email: JHartmanKing@KingWilliamsLaw.com

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Message

From: Jennifer Hartman King [JHartmanKing@kingwilliamsllp.com]
Sent: 1/6/2017 5:14:28 AM
To: Fogarty, Johnpc [Fogarty.Johnpc@epa.gov]; Welles, Laura [Welles.Laura@epa.gov]
CC: John Hempfling (CE CEN) [John.Hempfling@wholefoods.com]
Subject: [CONFIDENTIAL SETTLEMENT COMMUNICATION] Appendix B
Attachments: USEPA CAFO Appendix B (00014283xD64DF).pdf

Jennifer Hartman King, Managing Partner



520 Capitol Mall, Suite 750
Sacramento, CA 95814
916-379-7530 – Main phone
916-379-7533 – Direct dial
916-379-7535 – Fax
Email: JHartmanKing@KingWilliamsLaw.com

Website: www.KingWilliamsLaw.com
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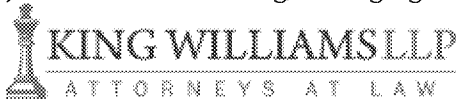
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Message

From: Jennifer Hartman King [JHartmanKing@kingwilliamsllp.com]
Sent: 1/6/2017 5:13:35 AM
To: Fogarty, Johnpc [Fogarty.Johnpc@epa.gov]
CC: John Hempfling (CE CEN) [John.Hempfling@wholefoods.com]
Subject: [CONFIDENTIAL SETTLEMENT COMMUNICATION] Appendix A
Attachments: USEPA CAFO Appendix A (00014282xD64DF).pdf

Jennifer Hartman King, Managing Partner



520 Capitol Mall, Suite 750
Sacramento, CA 95814
916-379-7530 – Main phone
916-379-7533 – Direct dial
916-379-7535 – Fax
Email: JHartmanKing@KingWilliamsLaw.com

Website: www.KingWilliamsLaw.com
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Message

From: Kelley, Rosemarie [Kelley.Rosemarie@epa.gov]
Sent: 3/31/2017 7:54:45 PM
To: Fogarty, Johnpc [Fogarty.Johnpc@epa.gov]; Welles, Laura [Welles.Laura@epa.gov]
Subject: FW: Bell CAFO is Lodged

Maybe this means they are ready to enter WF ;)

Rosemarie

-----Original Message-----

From: Belser, Evan
Sent: Friday, March 31, 2017 3:34 PM
To: Brooks, Phillip <Brooks.Phillip@epa.gov>; Maldonado, Zelma <Maldonado.Zelma@epa.gov>; Shinkman, Susan <Shinkman.Susan@epa.gov>; Kelley, Rosemarie <Kelley.Rosemarie@epa.gov>; Isin, Amelie <Isin.Amelie@epa.gov>; Malone, Erin <Malone.Erin@epa.gov>
Subject: RE: Bell CAFO is Lodged

The EAB just ratified our CAFO. No questions asked. Final order at https://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/4192ecc36740334585256fc500721f72/351a228b857b0d86852580f40052eab2!OpenDocument

Have a good weekend.

Evan

-----Original Message-----

From: Brooks, Phillip
Sent: Wednesday, March 22, 2017 4:06 PM
To: Belser, Evan <Belser.Evan@epa.gov>
Cc: Maldonado, Zelma <Maldonado.Zelma@epa.gov>; Shinkman, Susan <Shinkman.Susan@epa.gov>; Kelley, Rosemarie <Kelley.Rosemarie@epa.gov>; Isin, Amelie <Isin.Amelie@epa.gov>; Malone, Erin <Malone.Erin@epa.gov>
Subject: Re: Bell CAFO is Lodged

This really is a good resolution. Hats off to Amalie and Region 3 for making the case.

Sent from my iPhone

> On Mar 22, 2017, at 12:54 PM, Belser, Evan <Belser.Evan@epa.gov> wrote:
>
> I just lodged with the EAB our CAFO with Bell Trucks. Thank you to Erin and Amelie for a determined effort throughout, including a very strong follow-through at the very end. Hopefully soon the EAB will review and agree this is a fair and appropriate resolution!
>
> Regards,
> Evan
>
> Evan Belser
> Chief, Vehicle and Engine Enforcement Branch United States
> Environmental Protection Agency
> 202-564-6850
>
> <Bell CAFO as Lodged 03.22.2017.pdf>
> <Bell CAFO EAB Transmittal Memo. 03.21.2017.pdf>

Message

From: Cavalier, Beth [Cavalier.Beth@epa.gov]
Sent: 12/2/2016 9:02:23 PM
To: Fogarty, Johnpc [Fogarty.Johnpc@epa.gov]
CC: Welles, Laura [Welles.Laura@epa.gov]; Makepeace, Caroline [Makepeace.Caroline@epa.gov]
Subject: Re: Beth - can you give this a quick once-over, please?
Attachments: Light Ballast SEP - Whole Foods.12.2.16.docx

Hi John, sorry for the delay in response - got tied up a bit on a fire drill for the IO, and then had to do an **Ex. 6 Personal Privacy (PP)** anyway, I think this looks fine. It has all the required certifications, etc. and I'm assuming the text of the CAFO will include stips for failure to complete the project. Let me know if you want me to review anything else. Oh, just make sure the case file includes the nexus analysis.

Beth Cavalier
Analyst
Special Litigation and Projects Division
Office of Civil Enforcement
(202) 564-3271

From: Fogarty, Johnpc
Sent: Friday, December 2, 2016 10:41 AM
To: Cavalier, Beth
Cc: Welles, Laura
Subject: Beth - can you give this a quick once-over, please?

This is a first cut at a draft for the light ballast replacement SEP that we want to put on the table for the Wholefoods case. Can you please give it a quick review and let me know if I've missed or bollixed anything up? Any other drafting thoughts on it would also be welcome - thx!

Laura, we'll need to make sure the stips provision in the body of the CAFO covers SEPs as well.

**BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.**

IN THE MATTER OF:	)	EPA Docket No.
	)	RCRA-HQ-2016-_____
)	
)	
Whole Foods Market Group, Inc.,	)	Proceeding Under Section 3008(a) of the
Whole Foods Market California, Inc.,	)	Resource Conservation and Recovery Act,
Mrs. Gooch's Natural Food Markets, Inc.,	)	42 U.S.C. § 6928(a)
Whole Foods Market Pacific Northwest, Inc.,)	
Whole Foods Market Rocky Mountain/)	
Southwest, L.P.,)	
WFM Northern Nevada, Inc.,)	
WFM Southern Nevada, Inc.,)	
WFM Hawaii, LLC, and)	
WFM Kansas, LLC, and)	
<u>WFM-WO, Inc.</u>)	
)	
RESPONDENTS.)	

CONSENT AGREEMENT AND FINAL ORDER

I. PRELIMINARY STATEMENT

1. Complainant, the United States Environmental Protection Agency ("EPA"), and Respondents, Whole Foods Market Group, Inc., a Delaware corporation, Whole Foods Market California, Inc., a California corporation, Mrs. Gooch's Natural Food Markets, Inc., a California corporation, Whole Foods Market Pacific Northwest, Inc., a Delaware Corporation, Whole Foods Market Rocky Mountain/Southwest, L.P., a Texas limited partnership, WFM Northern Nevada, Inc., a Delaware Corporation, WFM Southern Nevada, Inc., a Delaware Corporation, WFM Hawaii, LLC, a Hawaii limited liability company, ~~and~~ WFM Kansas, LLC, a Kansas limited liability company, and WFM-WO, Inc. a Delaware corporation (collectively the "Respondents" or "Whole Foods Market"), hereby enter into this Consent Agreement ("Agreement" or "Consent

Agreement”), and the attached proposed Final Order (collectively, the “CAFO”) before taking testimony and without adjudication of any issues of fact or law herein.

2. Complainant and Respondents, having conferred for the purposes of settlement pursuant to the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (“Consolidated Rules”), 40 C.F.R. § 22.18, and expressing a mutual desire to enter into a global agreement covering the Whole Foods Market Stores identified in Appendix A of this CAFO, which is attached hereto and incorporated by reference herein, have agreed to the execution of this CAFO. Respondents hereby agree to comply with the terms of this CAFO.

3. For the purposes of this CAFO and in accordance with the specific requirements for settlement set forth in 40 C.F.R. § 22.18(b)(2):

- a. Respondents admit the jurisdictional allegations set forth in this CAFO;
- b. Respondents neither admit nor deny the factual allegations and legal conclusions contained in this CAFO;
- c. Respondents consent to the assessment and payment of the civil penalty in the amount and by the method set forth in this CAFO;
- d. Respondents consent to the terms and conditions specified in the compliance provisions set forth in this CAFO; and
- e. Respondents consent to perform the Supplemental Environmental ~~Projects~~Project set forth in this CAFO.

4. The Respondents waive any right they may have to contest the allegations set forth in this CAFO and any right to appeal the proposed Final Order set forth herein. 40 C.F.R. §

22.18(b)(2). Respondents do not waive any claims or defenses Respondents have to the interpretation of this CAFO or its terms.

II. THE PARTIES

5. Gregory Sullivan, Acting Director, Waste and Chemical Enforcement Division, Office of Civil Enforcement, Office of Enforcement and Compliance Assurance, is authorized, by lawful delegation, to initiate and settle civil administrative actions brought pursuant to Section 3008(a) of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976 and the Hazardous and Solid Waste Amendments (“HSWA”) of 1984 (collectively, “RCRA”), 42 U.S.C. § 6928(a).

6. Respondents own and operate the Whole Foods Market Stores identified in Appendix A, as specified therein, of this CAFO.

III. JURISDICTION

7. The parties agree to the commencement and conclusion of this matter through the issuance of this CAFO, which is authorized pursuant to Section 3008(a) of RCRA, 42 U.S.C. § 6928(a) and the Consolidated Rules, 40 C.F.R. §§ 22.13(b) and 22.18(b)(2) and (3).

8. RCRA Subtitle C (42 U.S.C. § 6921 *et seq.*) and its implementing regulations, set forth in 40 C.F.R. Parts 260-279, comprise EPA’s RCRA hazardous waste program. Section 3006(b) of RCRA, 42 U.S.C. § 6926(b), allows the Administrator to authorize a state to administer its own hazardous waste program in lieu of the federal program when the Administrator finds that the state program meets certain conditions.¹ A violation of a state provision authorized pursuant

¹ Each of the Affected States and Territories described herein, with the exception of Iowa, have received authorization to administer the base RCRA hazardous waste program (requirements imposed by the Solid Waste Disposal Act prior to the Hazardous and Solid Waste Amendments of 1984) in lieu of the federal government’s program. Not all the Affected States and Territories described herein are authorized to administer the Universal Waste regulations at 40

to Section 3006 of RCRA, 42 U.S.C. § 6926, constitutes a violation of a requirement of Subtitle C, and is subject to the assessment of civil penalties and issuance of compliance orders by EPA as provided by Section 3008(a) of RCRA, 42 U.S.C. § 6928(a).

9. Pursuant to RCRA Section 3008(a)(2), 42 U.S.C. § 6928(a)(2), notice of the commencement of this action has been given to all Affected States and Territories.

IV. DEFINITIONS

10. Unless otherwise expressly provided herein, terms used in the CAFO that are defined in RCRA, 42 U.S.C. §§ 6901 *et seq.*, or in regulations promulgated under RCRA, 40 C.F.R. Parts 260-279, or in a state's authorized hazardous waste program, shall have the same meaning in this CAFO as such term has under RCRA or under federal or applicable authorized state regulations. In the case of a conflict between federal and state definitions, federal definitions shall control. Whenever terms defined below are used in this CAFO, such definitions shall apply:

- a. "Affected State and Territory" means a state or territory of the United States in which a Whole Foods Market Store is located as identified in Appendix A of this CAFO. Oklahoma, Texas, Louisiana, New Mexico, and Arkansas are not Affected States for purposes of this CAFO.
- b. "Business Day" means any day other than Saturday, Sunday, or a federal or legal holiday.
- c. "Conditionally Exempt Small Quantity Generator" means a facility that generates 100 kg of hazardous waste or less in a calendar month.

C.F.R. Part 273. Thus, where applicable, citations to the Code of Federal Regulations is a citation to the corresponding regulations contained within the Affected State's or Territories' ~~Territory's~~ authorized RCRA hazardous waste program.

- d. “Confidential Business Information” or “CBI” shall have the same definition as in 40 C.F.R. §§ 2.201-2.406.
- e. “Consent Agreement and Final Order” or “CAFO” shall mean this Consent Agreement and attached Final Order and all Appendices hereto. In the event of conflict between this Consent Agreement and any Appendix, this Consent Agreement shall control.
- f. “Consumer Products” shall mean any merchandise sold by Respondents at Whole Foods Market Stores, which if discarded, may have to be managed as RCRA hazardous waste.
- g. “Day” means a calendar day unless expressly stated to be a business day. In computing any period of time under this CAFO, where the last day would fall on a Saturday, Sunday, or federal, legal or Affected State or Territory holiday, the period shall run until the close of business of the next business day.
- h. “Effective Date” is defined in Section ~~XVIII~~VIII of this CAFO.
- i. “EPA” means the United States Environmental Protection Agency.
- j. “Large Quantity Generator” means a facility that generates 1000 kg or more of hazardous waste in a calendar month.
- k. “Notify” and “Submit” and other terms signifying an obligation to transmit or communicate documents and information mean to deliver in person, send via electronic mail, deposit in the U.S. mail or dispatch by express courier so that such transmission or communication arrives to the designated recipient by close of business on the day required by this CAFO. If that required day is not a Business Day then the delivery, deposit, or dispatch shall be made by the close of business the next Business Day.

- l. “Paragraph” shall mean a portion of this CAFO identified by an arabic numeral and, in some cases, an associated lower case letter.
- m. “Parties” shall mean Complainant and all Respondents.
- n. “RCRA” means the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 *et seq.*
- o. “Respondents” mean the entities described in Paragraphs 1 and 6 of this CAFO.
- p. “Retail Associate” means a Whole Foods Market Store employee, including store leadership and team members.
- q. “Section” shall mean a portion of this CAFO identified by a roman numeral.
- r. “Small Quantity Generator” means a facility that generates more than 100 kg and less than 1000 kg of hazardous waste in a calendar month.
- s. “Small Quantity Handler of Universal Waste” means a generator of universal waste that does not accumulate 5,000 kilograms or more of universal waste (e.g., batteries, mercury-containing equipment, or fluorescent lamps, calculated collectively) at any time. 40 C.F.R. § 273.9.
- t. “Solid Waste” means any discarded material that is not excluded under 40 C.F.R. § 261.4(a) or that is not excluded by variance granted under §§ 260.30 and 260.31.
- u. “Stores,” “Facilities,” or “Whole Foods Market Stores” mean Whole Foods Market retail grocery stores, or any future Whole Foods Market retail grocery store (including “365 by Whole Foods Market” stores), located in the United States (including Puerto Rico and other U.S. territories).
- v. “United States” means the United States of America, and all of its departments, agencies, and instrumentalities.

- w. “Universal Waste” means certain hazardous wastes that are subject to the universal waste requirements of 40 C.F.R. Part 273, including fluorescent lamps. 40 C.F.R. §§ 273.1 and 273.9.

V. EPA ALLEGATIONS AND DETERMINATIONS

11. Each Respondent is a “person” as defined in Section 1004(15) of RCRA, 42 U.S.C. § 6903(15) and 40 C.F.R. § 260.10.

12. Respondents own and operate the Stores identified in Appendix A, as specified therein, of this CAFO. The stores identified in Appendix A are “facilities” within the meaning of 40 C.F.R. § 260.10.

13. Respondents sell Consumer Products, some of which may become “solid waste” when they are returned, expired, spill or are in a condition such that they cannot be used for their intended purpose.

14. Some of the Consumer Products that become solid waste may be considered hazardous waste under federal or state law by having the characteristic of ignitability (D001), corrosivity (D002), or toxicity (D007, D010, D009, and D011).

15. Most, if not all, Whole Foods Market Stores generate 100 kilograms (“kg”) of hazardous waste or less in any given month, and therefore, are considered Conditionally Exempt Small Quantity Generators (“CESQGs”) pursuant to 40 C.F.R. § 261.5. As CESQGs, the Stores are exempt from regulation under the hazardous waste generator requirements at 40 C.F.R. Part 262 and the notification requirements of RCRA Section 3010 in any given month, provided that the requirements in 40 C.F.R. § 261.5 are met.

16. Between August 2014 and August 2015, EPA Region 6 conducted an investigation of Whole Food Company, Inc. and Respondent Whole Foods Market Rocky Mountain/Southwest,

L.P.'s Stores located in Texas, Oklahoma, New Mexico, Louisiana and Arkansas (the "Investigation"). From the Investigation, EPA Region 6 concluded that a sufficient hazardous waste determination was not consistently made on all solid waste streams as required by 40 C.F.R. § 262.11(c), and one or more of the universal waste requirements set forth in 40 C.F.R. §§ 273.13 through 273.16 were not consistently complied with.

17. As a result of the Investigation, EPA Region 6, Whole Food Company, Inc. and Respondent Whole Foods Market Rocky Mountain/Southwest, L.P. entered into consent agreements and final orders for the Stores located within EPA Region 6's jurisdiction (the "Region 6 CAFOs").

~~18.~~ Following the Investigation and Region 6 CAFOs, Respondents voluntarily contacted EPA and EPA the Parties engaged in discussions that led to ~~the Parties~~ them agreeing to enter into a similar settlement agreement for Stores located in the Affected States and Territories, other than those covered by the Region 6 CAFOs. As part of the settlement discussions, Respondents informed EPA that there were no

18. spills, leaks or releases at or from Respondents' Facilities, nor has EPA identified any such spills, leaks or releases.

19. The ~~Parties~~ Parties' discussions have resulted in the agreement contained herein, which includes implementation of an enhanced hazardous waste management system in all of Respondents' Stores. This enhanced hazardous waste management system is designed to ensure the proper management of hazardous wastes at all Whole Foods Market Stores, and in many respects goes beyond the minimum requirements necessary for compliance with the applicable federal and state hazardous waste laws and regulations. This program is more fully described in Paragraphs ~~27 through 29~~ 27 through 29 of this CAFO and ~~appendices~~ Appendices B through E.

20. Respondents have already taken steps toward implementing their enhanced hazardous waste management program, prior to the Effective Date of this CAFO.

Hazardous Waste Determinations

21. Pursuant to 40 C.F.R. § 262.11, a person who generates a solid waste is required to determine if that waste is hazardous.

22. Based upon the terms of the Region 6 CAFOs, and without a nationwide investigation, or any admission of liability or guilt by Respondents, EPA has concluded that Respondents did not make sufficient hazardous waste determinations at all Whole Foods Market Stores as required by 40 C.F.R. § 262.11.

Universal Waste Management

23. Pursuant to 40 C.F.R. § 273.10, a small quantity handler of universal waste must comply with the applicable requirements at 40 C.F.R. §§ 273.10 through 273.20.

24. Based upon the terms of the Region 6 CAFOs, and without a nationwide investigation, or any admission of liability or guilt by Respondents, EPA has concluded that Respondents did not sufficiently comply with some of the standards set forth in 40 C.F.R. §§ 273.13 through 273.16 at all Whole Foods Market Stores.

VI. TERMS OF SETTLEMENT

25. Based on the foregoing, the Parties agree to the entry of this Consent Agreement on the terms set forth herein.

A. Compliance Provisions

26. Although a majority of Whole Foods Market Stores may qualify as CESQGs in any given month, pursuant to 40 C.F.R. § 261.5, the enhanced hazardous waste management program implemented by Respondents at Whole Foods Market Stores, as referenced in Paragraphs 27

through ~~_____~~29 and Appendices ~~_____~~B through ~~_____~~E of this CAFO, generally seeks to satisfy the hazardous waste generator requirements applicable to Small Quantity Generators (“SQGs”) and, therefore, goes above and beyond the minimum requirements applicable under the law.

27. As a condition of settlement, Respondents agree to implement the following measures as part of their enhanced hazardous waste management program:

a. If applicable, Respondents shall obtain an EPA identification number for a Whole Foods Market Store pursuant to 40 C.F.R. § 262.12.

b. Respondents must make a hazardous waste determination on all solid waste generated in its Stores pursuant to 40 C.F.R. § 262.11. As a means of complying with this requirement, Respondents have implemented, and will continue to implement Regional and/or State-specific hazardous waste determination guidance charts. These Regional and/or State-specific hazardous waste determination guidance charts are described and set forth in Appendix B of this CAFO. These charts are marked as and considered Confidential Business Information pursuant to 40 C.F.R. Part 2.

~~c. Respondents must implement an electronic hazardous waste identification system as follows:~~

~~i. Within _____ months of the Effective Date of this CAFO, Respondents will hire a third-party consultant to review the Consumer Products at its Stores, and determine whether those Consumer Products, if discarded, would become hazardous waste pursuant to federal and state law and regulations.~~

~~ii. After the potentially hazardous items are identified, the third-party consultant or other qualified personnel will load the information into Respondents' electronic hazardous waste identification system for use at Whole Foods Market Stores in identifying and classifying all solid waste streams, which may include the use of hand held scanners, in-store computer terminal, or other computer-based system(s).~~

~~iii. Within _____ months of the Effective Date of this CAFO, the Respondents' electronic hazardous waste identification system will be fully implemented at its Stores.~~

~~d.c.~~ To the extent Consumer Products become hazardous waste, Respondents have implemented, and will continue to implement a system to properly accumulate and store hazardous waste on-site ~~per many of the requirements applicable to SQGs,~~ including, but not limited to, inspections and management of containers. This system, commonly referred to as the "bucket" or "tote" system, accumulates and stores hazardous waste until it is picked up by a licensed hazardous waste hauler for proper off-site transport and disposal. Under this system, Respondents maintain records, such as manifests, to demonstrate proper off-site transport and disposal at their Stores. The "bucket" or "tote" system and the associated quick-reference materials for Retail Associates are further described and set forth in Appendix C of this CAFO. This system is marked as and considered Confidential Business Information pursuant to 40 C.F.R. Part 2.

~~e.d.~~ Respondents have implemented, and will continue to implement hazardous waste management trainings at its Stores for all Retail Associates. The hazardous waste management training materials for Retail Associates are further described in ~~Attachment~~Appendix D of this CAFO. The training materials are marked as and considered Confidential Business Information pursuant to 40 C.F.R. Part 2.

28. Respondents shall continue their efforts to implement an electronic hazardous waste identification system as follows:

- a. Respondents will consult a third-party to review the Consumer Products at its Stores, and determine whether those Consumer Products, if discarded, would become hazardous waste pursuant to federal and state law and regulations.
- b. After the potentially hazardous items are identified, Whole Foods Market shall implement the electronic hazardous waste identification system to the maximum extent that Whole Foods Market determines it is operationally and technologically feasible. The third-party consultant or other qualified personnel will load the information into Respondents' electronic hazardous waste identification system for use at Whole Foods Market Stores in identifying and classifying all solid waste streams, which may include the use of hand-held scanners, in-store computer terminal, or other computer-based system(s).

~~28.29.~~ In order to assist its Stores in implementing Respondents' enhanced hazardous waste management program described in Paragraph 27 of this CAFO, Respondents will develop and implement standard operating procedures ("SOPs") for use by Retail Associates at their Stores. These SOPs will be available and accessible to Retail Associates. These procedures are further

described in ~~Attachment~~Appendix E of this CAFO. The SOPs are marked as and considered Confidential Business Information pursuant to 40 C.F.R. Part 2.

~~29-30.~~ No later than March 31, 2018, and annually thereafter until termination of this CAFO, Respondents must submit an annual report to EPA for the preceding calendar year that shall include: ~~a list of any items identified by the third party consultant described in Paragraph 27(e)(i);~~ implementation progress of its electronic hazardous waste identification system described in Paragraph 27(e)(ii) and (iii);~~28,~~ including a description of the technology used for the system;~~;~~ and any other changes or updates associated with its enhanced hazardous waste management program, as described in Paragraphs 27 and 28 and Global-Level² revisions to the Appendices of this CAFO. These annual reports will be marked as and considered Confidential Business Information pursuant to 40 C.F.R. Part 2.

~~30. Third Party Audit [To Be Discussed]~~

31. Respondents' third party audit procedures are further described in Appendix F of this CAFO. The Third Party Audit procedures are marked as and considered Confidential Business Information pursuant to 40 C.F.R. Part 2.

~~31-32.~~ In all instances in which this CAFO requires written submission to EPA, each submission must be signed by a responsible corporate officer of Whole Foods Market and include the following certification:

I certify under penalty of law that I have personally examined and am familiar with the information submitted in this document and all documents submitted herewith; and that, to the best of my knowledge and belief, the submitted information is true, accurate, and complete; and that all documents submitted herewith are complete and authentic, unless otherwise indicated. I am aware that there are significant penalties for submitting false information, including the possibility of fine or imprisonment.

² "Global-Level" shall be defined as any change to this CAFO's Appendices instituted and/or approved by Whole Foods Market's Global Legal Team.

B. Civil Penalty

~~32-33.~~ Respondents agree to pay a civil penalty in the sum of \$~~_____~~\$500,000.00 within thirty (30) days of the Effective Date of this CAFO.

~~33-34.~~ Respondents must pay the assessed civil penalty by either cashier's check, certified check, or wire transfer, made payable to: **Treasurer, United States of America**. Payment must be remitted in one of three (3) ways: regular U.S. Postal mail (including certified mail), overnight mail, or wire transfer. For regular U.S. Postal mail, U.S. Postal Service certified mail, or U.S. Postal Service express mail, the check should be remitted to:

United States Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, Missouri 63197-9000

For overnight mail (non-U.S. Postal Service, e.g. Fed Ex), the check should be remitted to:

U.S. Bank
Government Lockbox 979077
U.S. EPA Fines and Penalties
1005 Convention Plaza
SL-MO-C2-GL
St. Louis, Missouri 63101
Phone No. (314) 425-1818

For wire transfer, the payment should be remitted to:

Federal Reserve Bank of New York
ABA Routing Number: 021030004
Account Number: 68010727
SWIFT address: FRNYUS33
33 Liberty Street
New York, NY 10045
Field Tag 4200 of the Fedwire message should read: "D 68010727 Environmental Protection Agency"

The case name and document number (In the Matter of Whole Foods Market Group, Inc., et. al., Docket No. RCRA-HQ-2016-____) must be clearly documented on or within Respondents' chosen method of payment to ensure proper credit.

~~34-35~~ Respondents shall submit a copy of the payment to the following addresses:

U.S. Environmental Protection Agency
Clerk of the Board
Environmental Appeals Board
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460-0001

Laura Welles, Attorney-Advisor
Waste and Chemical Enforcement Division
Office of Civil Enforcement
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W. (MC 2249A)
Washington, D.C. 20460

~~35-36~~ Penalties paid pursuant to this CAFO are not deductible for federal purposes under 26 U.S.C. § 162(f).

~~36-37~~ Pursuant to 31 U.S.C. § 3717 and 40 C.F.R. § 13.11, unless otherwise prohibited by law, EPA will assess interest and late payment penalties on debts owed to the United States and a charge to cover the costs of processing and handling the delinquent claim. Interest on the civil penalty assessed in this CAFO will begin to accrue thirty (30) days after the effective date of the CAFO and will be recovered by EPA on any amount of the civil penalty that is not paid by the respective due date. In accordance with 31 U.S.C. § 3717 and 40 C.F.R. § 13.11, Respondents must pay the following amounts on any amount overdue:

- a. Interest. Any unpaid portion of a civil penalty must bear interest at the rate established by the Secretary of the Treasury pursuant to 31 U.S.C. § 3717(a)(1).

Interest will therefore begin to accrue on a civil penalty or stipulated penalty if it is

not paid by the last date required. Interest will be assessed at the rate of the United States Treasury tax and loan rate in accordance with 40 C.F.R. § 13.11(a).

- b. Monthly Handling Charge. Respondents must pay a late payment handling charge of fifteen (\$15.00) on any late payment, with an additional charge of \$15.00 for each subsequent thirty (30) day period over which an unpaid balance remains.
- c. Non-payment Penalty. On any portion of a civil penalty more than ninety (90) days past due, Respondents must pay a non-payment penalty charge of six percent (6%) per annum, which will accrue from the date the penalty payment became due and is not paid. 40 C.F.R. § 13.11(c). This non-payment penalty charge is in addition to charges which accrue or may accrue under subparagraphs (a) and (b).

C. Supplemental Environmental Project

~~37-38.~~ [Terms TBD]

D. Delay in Performance/Stipulated Penalties

~~38-39.~~ Upon written notice of an alleged violation of the requirements set forth in Section VI.C. (Supplemental Environmental Project) of this CAFO or of the applicable federal hazardous waste regulations set forth in 40 Code of Federal Regulations Parts 260-279, Respondents shall have nine (9) days to cure the alleged violation. In the event Respondents fail to cure the alleged violation within the nine (9) day time period, Respondents shall be liable for stipulated penalties to the EPA, as specified below; ~~for failure to comply with the requirements of this CAFO, unless excused by EPA in its sole discretion. Respondents must pay stipulated penalties for the following obligations in the amounts set forth below: (a) for failure to timely submit reports; for failure to complete SEPs; or for failure to comply with Paragraphs _____ of this CAFO.~~

Period of Failure to Comply	Penalty Per Violation Per Day
-----------------------------	-------------------------------

1st 10th through 7th 20 th day	\$100.00
8th 21st through 21st 30 th day	\$250.00
22nd through 30th day	\$500.00
Greater than 30 days	\$1,000 500.00

~~39-40~~ Payment of stipulated penalties will not alter in any way Whole Foods Market's obligation to comply with the requirements of this CAFO.

VII. DISPUTE RESOLUTION

~~40-41~~ The dispute resolution procedures set forth in this Section shall be the exclusive mechanism to resolve any disputes arising under or with respect to this CAFO.

~~41-42~~ The Parties agree to meet and confer informally and in good faith to resolve all disputes arising from this CAFO. If Respondents disagree, in whole or in part, with any decision by EPA regarding this CAFO, Respondents agree to notify EPA, through the Chief of the Waste Enforcement Branch, and the Parties agree to use best efforts to informally and in good faith resolve their dispute. If EPA disagrees, in whole or in part, with any action or inaction taken by a Respondent under this CAFO, EPA agrees to notify Respondent, and the Parties agree to use their best efforts to informally and in good faith resolve their dispute— within thirty (30) days. If the Parties are unable to resolve their dispute informally, and both Parties agree they have reached an impasse, they shall submit the dispute to a neutral third party mediator selected and agreed upon by the Parties and the Parties shall participate in non-binding mediation consistent with 40 C.F.R. 22.18(d).

VIII. OTHER MATTERS

~~42. Respondents' full compliance with this Consent Agreement shall only resolve Respondents' liability for federal civil penalties for the violations alleged in Section V (EPA Allegations and Determinations) of this CAFO. This CAFO does not affect the right of U.S. EPA or the United States to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violations of law.~~

43. Nothing in this CAFO shall relieve Respondents of the duty to comply with all applicable provisions of RCRA and any other federal, state, or local laws and regulations.

44. Notwithstanding any other provision of this CAFO, nothing in this CAFO shall be construed to limit the authority of the EPA to take any action against Respondents to address conditions that may present an imminent and substantial endangerment to human health or the environment. Complainant reserves the right to take enforcement action against Respondents for any future violations of RCRA and the implementing regulations and to enforce the terms and conditions of this CAFO.

45. EPA and Respondents agree that Respondents' have no obligations under this Consent Agreement should it be rejected by the Environmental Appeals Board (the "EAB"); provided, however, that in the event that the EAB expresses any objections to, or its intent to reject this Consent Agreement, the Parties agree that they shall exercise their mutual best efforts to address and resolve the EAB's objections. The parties shall have the right to withdraw from this CAFO in the event they are unable to reach agreement on the EAB's proposed changes or objections.

46. ~~Unless specifically allowed under the terms of this CAFO, this~~This CAFO may be amended or modified only by written agreement executed by both the EPA and each Respondent.

47. The terms of this CAFO ~~bind~~binds the ~~Respondents~~Parties and their successors and assigns.

48. The undersigned representative of each party to this CAFO certifies that each is duly authorized by the party whom he or she represents to enter into these terms and conditions and to legally bind that party to it.

49. Unless otherwise specified herein, whenever notice is required to be given, whenever a report or other document is required to be forwarded by one party to another, or whenever a submission or demonstration is required to be made, it must be directed to the individuals specified below at the addresses given, unless these individuals or their successors give notice in writing to the other parties that another individual has been designated to receive the communication:

Complainant:

Chief, Waste Enforcement Branch
Waste and Chemical Enforcement Division
Office of Civil Enforcement
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W. (MC 2249A)
Washington, D.C. 20460

Respondents:

Whole Foods Market Central Office
Attn: John H. Hempfling II
550 Bowie Street
Austin, TX 78703

With copy to:

King Williams LLP
Attn: Jennifer Hartman King
520 Capitol Mall, Ste 750
Sacramento, CA 95814

50. At such time as the Respondents believe ~~it has~~they have completed all of the requirements of this CAFO, Respondents shall so certify in writing and in accordance with the certification language set forth in Paragraph 31. ~~Unless EPA objects in writing within sixty (60) days of receipt of Respondents' certification, then this CAFO shall terminate on the basis of Respondents' certification.~~32. Within sixty (60) days of EPA's receipt of Respondents' certification, EPA shall notify Respondents in writing whether EPA agrees that Respondents have completed all requirements, or if EPA does not agree it shall identify the basis for its position. If EPA does not agree with Whole Foods Market's certification, Whole Foods Market shall address the matters identified in EPA's objection, and may thereafter recertify completion of the CAFO. Upon notification by EPA that it agrees with Respondents' certification, or if EPA does not respond within sixty (60) days, Respondents' liability for federal civil penalties only is resolved for the violations alleged in Section V (EPA Allegations and Determinations) of this CAFO. This CAFO does not affect the right of EPA or the United States from taking action as provided by 40 C.F.R. 22.18(c).

51. The headings in this CAFO are for convenience of reference only and shall not affect the interpretation of this CAFO.

52. The Parties to this CAFO shall bear their own costs and attorneys' fees in this matter.

53. ~~The Effective Date of this~~This CAFO is~~and the date attached proposed Final Order shall become effective upon execution of the Final Order is filed by EAB and filing with the EAB Clerk of the EAB ("Effective Date").~~40 C.F.R. §§ 22.18(b)(2) and 22.31(b).

~~10/18/2016 DRAFT CAFO sent to Whole Foods Market with WFM Revisions EPA edits~~
~~11-10-2016 WFM Revisions 12-1-16 EPA edits 12-13-16~~

AGREED AND CONSENTED TO:

FOR COMPLAINANT:

Date: _____

Greg Sullivan, Acting Director
Waste and Chemical Enforcement Division
Office of Civil Enforcement
Office of Enforcement and Compliance Assurance
United States Environmental Protection Agency

Date: _____

(Counsel for Complainant)
Waste and Chemical Enforcement Division
Office of Civil Enforcement
Office of Enforcement and Compliance Assurance
United States Environmental Protection Agency

FOR RESPONDENT WHOLE FOODS MARKET GROUP, INC.:

Date: _____

FOR RESPONDENT WHOLE FOODS MARKET CALIFORNIA, INC.:

Date: _____

FOR RESPONDENT MRS. GOOCH'S FOOD MARKETS, INC.:

Date: _____

FOR RESPONDENT WHOLE FOODS MARKET PACIFIC NORTHWEST, INC.:

Date: _____

FOR RESPONDENT WHOLE FOODS MARKET ROCKY MOUNTAIN/SOUTHWEST, L.P.:

Date: _____

FOR RESPONDENT WFM NORTHERN NEVADA, INC.:

Date: _____

FOR RESPONDENT WFM SOUTHERN NEVADA, INC.:

Date: _____

FOR RESPONDENT WFM HAWAII, LLC:

Date: _____

FOR RESPONDENT WFM KANSAS, LLC:

Date: _____

FOR RESPONDENT WFM-WO, INC.:

Date: _____

~~10/18/2016 DRAFT CAFO sent to Whole Foods Market with WFM Revisions EPA edits~~
~~11-10-2016 WFM Revisions 12-1-16 EPA edits 12-13-16~~

**BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.**

IN THE MATTER OF:	)	EPA Docket No.
	)	RCRA-HQ-2016-_____
)	
)	
Whole Foods Market Group, Inc.,	)	Proceeding Under Section 3008(a) of the
Whole Foods Market California, Inc.,	)	Resource Conservation and Recovery Act,
Mrs. Gooch's Natural Food Markets, Inc.,	)	42 U.S.C. § 6928(a)
Whole Foods Market Pacific Northwest, Inc.,)	
Whole Foods Market Rocky Mountain/ Southwest, L.P.,)	
WFM Northern Nevada, Inc.,)	
WFM Southern Nevada, Inc.,)	
WFM Hawaii, LLC,)	
WFM Kansas, LLC, and)	
WFM-WO, Inc.)	
)	
RESPONDENTS.)	

CONSENT AGREEMENT AND FINAL ORDER

I. PRELIMINARY STATEMENT

1. Complainant, the United States Environmental Protection Agency ("EPA"), and Respondents, Whole Foods Market Group, Inc., a Delaware corporation, Whole Foods Market California, Inc., a California corporation, Mrs. Gooch's Natural Food Markets, Inc., a California corporation, Whole Foods Market Pacific Northwest, Inc., a Delaware Corporation, Whole Foods Market Rocky Mountain/Southwest, L.P., a Texas limited partnership, WFM Northern Nevada, Inc., a Delaware Corporation, WFM Southern Nevada, Inc., a Delaware Corporation, WFM Hawaii, LLC, a Hawaii limited liability company, WFM Kansas, LLC, a Kansas limited liability company, and WFM-WO, Inc. a Delaware corporation (collectively the "Respondents" or "Whole Foods Market"), hereby enter into this Consent Agreement ("Agreement" or "Consent

Agreement”), and the attached proposed Final Order (collectively, the “CAFO”) before taking testimony and without adjudication of any issues of fact or law herein.

2. Complainant and Respondents, having conferred for the purposes of settlement pursuant to the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (“Consolidated Rules”), 40 C.F.R. § 22.18, and expressing a mutual desire to enter into a global agreement covering the Whole Foods Market Stores identified in Appendix A of this CAFO, which is attached hereto and incorporated by reference herein, have agreed to the execution of this CAFO. Respondents hereby agree to comply with the terms of this CAFO.

3. For the purposes of this CAFO and in accordance with the specific requirements for settlement set forth in 40 C.F.R. § 22.18(b)(2):

- a. Respondents admit the jurisdictional allegations set forth in this CAFO;
- b. Respondents neither admit nor deny the factual allegations and legal conclusions contained in this CAFO;
- c. Respondents consent to the assessment and payment of the civil penalty in the amount and by the method set forth in this CAFO;
- d. Respondents consent to the terms and conditions specified in the compliance provisions set forth in this CAFO; and
- e. Respondents consent to perform the Supplemental Environmental Project set forth in this CAFO.

4. The Respondents waive any right they may have to contest the allegations set forth in this CAFO and any right to appeal the proposed Final Order set forth herein. 40 C.F.R. §

22.18(b)(2). Respondents do not waive any claims or defenses Respondents have to the interpretation of this CAFO or its terms.

II. THE PARTIES

5. Gregory Sullivan, Acting Director, Waste and Chemical Enforcement Division, Office of Civil Enforcement, Office of Enforcement and Compliance Assurance, is authorized, by lawful delegation, to initiate and settle civil administrative actions brought pursuant to Section 3008(a) of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976 and the Hazardous and Solid Waste Amendments (“HSWA”) of 1984 (collectively, “RCRA”), 42 U.S.C. § 6928(a).

6. Respondents own and operate the Whole Foods Market Stores identified in Appendix A, as specified therein, of this CAFO.

III. JURISDICTION

7. The parties agree to the commencement and conclusion of this matter through the issuance of this CAFO, which is authorized pursuant to Section 3008(a) of RCRA, 42 U.S.C. § 6928(a) and the Consolidated Rules, 40 C.F.R. §§ 22.13(b) and 22.18(b)(2) and (3).

8. RCRA Subtitle C (42 U.S.C. § 6921 *et seq.*) and its implementing regulations, set forth in 40 C.F.R. Parts 260-279, comprise EPA’s RCRA hazardous waste program. Section 3006(b) of RCRA, 42 U.S.C. § 6926(b), allows the Administrator to authorize a state to administer its own hazardous waste program in lieu of the federal program when the Administrator finds that the state program meets certain conditions.¹ A violation of a state provision authorized pursuant

¹ Each of the Affected States and Territories described herein, with the exception of Iowa, have received authorization to administer the base RCRA hazardous waste program (requirements imposed by the Solid Waste Disposal Act prior to the Hazardous and Solid Waste Amendments of 1984) in lieu of the federal government’s program. Not all the Affected States and Territories described herein are authorized to administer the Universal Waste regulations at 40

to Section 3006 of RCRA, 42 U.S.C. § 6926, constitutes a violation of a requirement of Subtitle C, and is subject to the assessment of civil penalties and issuance of compliance orders by EPA as provided by Section 3008(a) of RCRA, 42 U.S.C. § 6928(a).

9. Pursuant to RCRA Section 3008(a)(2), 42 U.S.C. § 6928(a)(2), notice of the commencement of this action has been given to all Affected States and Territories.

IV. DEFINITIONS

10. Unless otherwise expressly provided herein, terms used in the CAFO that are defined in RCRA, 42 U.S.C. §§ 6901 *et seq.*, or in regulations promulgated under RCRA, 40 C.F.R. Parts 260-279, or in a state's authorized hazardous waste program, shall have the same meaning in this CAFO as such term has under RCRA or under federal or applicable authorized state regulations. In the case of a conflict between federal and state definitions, federal definitions shall control. Whenever terms defined below are used in this CAFO, such definitions shall apply:

- a. "Affected State and Territory" means a state or territory of the United States in which a Whole Foods Market Store is located as identified in Appendix A of this CAFO. Oklahoma, Texas, Louisiana, New Mexico, and Arkansas are not Affected States for purposes of this CAFO.
- b. "Business Day" means any day other than Saturday, Sunday, or a federal or legal holiday.
- c. "Conditionally Exempt Small Quantity Generator" means a facility that generates 100 kg of hazardous waste or less in a calendar month.

C.F.R. Part 273. Thus, where applicable, citations to the Code of Federal Regulations is a citation to the corresponding regulations contained within the Affected State's or Territory's authorized RCRA hazardous waste program.

- d. “Confidential Business Information” or “CBI” shall have the same definition as in 40 C.F.R. §§ 2.201-2.406.
- e. “Consent Agreement and Final Order” or “CAFO” shall mean this Consent Agreement and attached Final Order and all Appendices hereto. In the event of conflict between this Consent Agreement and any Appendix, this Consent Agreement shall control.
- f. “Consumer Products” shall mean any merchandise sold by Respondents at Whole Foods Market Stores, which if discarded, may have to be managed as RCRA hazardous waste.
- g. “Day” means a calendar day unless expressly stated to be a business day. In computing any period of time under this CAFO, where the last day would fall on a Saturday, Sunday, or federal, legal or Affected State or Territory holiday, the period shall run until the close of business of the next business day.
- h. “Effective Date” is defined in Section VIII of this CAFO.
- i. “EPA” means the United States Environmental Protection Agency.
- j. “Large Quantity Generator” means a facility that generates 1000 kg or more of hazardous waste in a calendar month.
- k. “Notify” and “Submit” and other terms signifying an obligation to transmit or communicate documents and information mean to deliver in person, send via electronic mail, deposit in the U.S. mail or dispatch by express courier so that such transmission or communication arrives to the designated recipient by close of business on the day required by this CAFO. If that required day is not a Business Day then the delivery, deposit, or dispatch shall be made by the close of business the next Business Day.

- l. “Paragraph” shall mean a portion of this CAFO identified by an arabic numeral and, in some cases, an associated lower case letter.
- m. “Parties” shall mean Complainant and all Respondents.
- n. “RCRA” means the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 *et seq.*
- o. “Respondents” mean the entities described in Paragraphs 1 and 6 of this CAFO.
- p. “Retail Associate” means a Whole Foods Market Store employee, including store leadership and team members.
- q. “Section” shall mean a portion of this CAFO identified by a roman numeral.
- r. “Small Quantity Generator” means a facility that generates more than 100 kg and less than 1000 kg of hazardous waste in a calendar month.
- s. “Small Quantity Handler of Universal Waste” means a generator of universal waste that does not accumulate 5,000 kilograms or more of universal waste (e.g., batteries, mercury-containing equipment, or fluorescent lamps, calculated collectively) at any time. 40 C.F.R. § 273.9.
- t. “Solid Waste” means any discarded material that is not excluded under 40 C.F.R. § 261.4(a) or that is not excluded by variance granted under §§ 260.30 and 260.31.
- u. “Stores,” “Facilities,” or “Whole Foods Market Stores” mean Whole Foods Market retail grocery stores, or any future Whole Foods Market retail grocery store (including “365 by Whole Foods Market” stores), located in the United States (including Puerto Rico and other U.S. territories).
- v. “United States” means the United States of America, and all of its departments, agencies, and instrumentalities.

- w. “Universal Waste” means certain hazardous wastes that are subject to the universal waste requirements of 40 C.F.R. Part 273, including fluorescent lamps. 40 C.F.R. §§ 273.1 and 273.9.

V. EPA ALLEGATIONS AND DETERMINATIONS

11. Each Respondent is a “person” as defined in Section 1004(15) of RCRA, 42 U.S.C. § 6903(15) and 40 C.F.R. § 260.10.

12. Respondents own and operate the Stores identified in Appendix A, as specified therein, of this CAFO. The stores identified in Appendix A are “facilities” within the meaning of 40 C.F.R. § 260.10.

13. Respondents sell Consumer Products, some of which may become “solid waste” when they are returned, expired, spill or are in a condition such that they cannot be used for their intended purpose.

14. Some of the Consumer Products that become solid waste may be considered hazardous waste under federal or state law by having the characteristic of ignitability (D001), corrosivity (D002), or toxicity (D007, D010, D009, and D011).

15. Most, if not all, Whole Foods Market Stores generate 100 kilograms (“kg”) of hazardous waste or less in any given month, and therefore, are considered Conditionally Exempt Small Quantity Generators (“CESQGs”) pursuant to 40 C.F.R. § 261.5. As CESQGs, the Stores are exempt from regulation under the hazardous waste generator requirements at 40 C.F.R. Part 262 and the notification requirements of RCRA Section 3010 in any given month, provided that the requirements in 40 C.F.R. § 261.5 are met.

16. Between August 2014 and August 2015, EPA Region 6 conducted an investigation of Whole Food Company, Inc. and Respondent Whole Foods Market Rocky Mountain/Southwest,

L.P.'s Stores located in Texas, Oklahoma, New Mexico, Louisiana and Arkansas (the "Investigation"). From the Investigation, EPA Region 6 concluded that a sufficient hazardous waste determination was not consistently made on all solid waste streams as required by 40 C.F.R. § 262.11(c), and one or more of the universal waste requirements set forth in 40 C.F.R. §§ 273.13 through 273.16 were not consistently complied with.

17. As a result of the Investigation, EPA Region 6, Whole Food Company, Inc. and Respondent Whole Foods Market Rocky Mountain/Southwest, L.P. entered into consent agreements and final orders for the Stores located within EPA Region 6's jurisdiction (the "Region 6 CAFOs").

18. Following the Investigation and Region 6 CAFOs, Respondents voluntarily contacted EPA and the Parties engaged in discussions that led to them agreeing to enter into a similar settlement agreement for Stores located in the Affected States and Territories, other than those covered by the Region 6 CAFOs. As part of the settlement discussions, Respondents informed EPA that there were no spills, leaks or releases at or from Respondents' Facilities, nor has EPA identified any such spills, leaks or releases.

19. The Parties' discussions have resulted in the agreement contained herein, which includes implementation of an enhanced hazardous waste management system in all of Respondents' Stores. This enhanced hazardous waste management system is designed to ensure the proper management of hazardous wastes at all Whole Foods Market Stores, and in many respects goes beyond the minimum requirements necessary for compliance with the applicable federal and state hazardous waste laws and regulations. This program is more fully described in Paragraphs 27 through 29 of this CAFO and Appendices B through E.

20. Respondents have already taken steps toward implementing their enhanced hazardous waste management program, prior to the Effective Date of this CAFO.

Hazardous Waste Determinations

21. Pursuant to 40 C.F.R. § 262.11, a person who generates a solid waste is required to determine if that waste is hazardous.

22. Based upon the terms of the Region 6 CAFOs, and without a nationwide investigation, or any admission of liability or guilt by Respondents, EPA has concluded that Respondents did not make sufficient hazardous waste determinations at all Whole Foods Market Stores as required by 40 C.F.R. § 262.11.

Universal Waste Management

23. Pursuant to 40 C.F.R. § 273.10, a small quantity handler of universal waste must comply with the applicable requirements at 40 C.F.R. §§ 273.10 through 273.20.

24. Based upon the terms of the Region 6 CAFOs, and without a nationwide investigation, or any admission of liability or guilt by Respondents, EPA has concluded that Respondents did not sufficiently comply with some of the standards set forth in 40 C.F.R. §§ 273.13 through 273.16 at all Whole Foods Market Stores.

VI. TERMS OF SETTLEMENT

25. Based on the foregoing, the Parties agree to the entry of this Consent Agreement on the terms set forth herein.

A. Compliance Provisions

26. Although a majority of Whole Foods Market Stores may qualify as CESQGs in any given month, pursuant to 40 C.F.R. § 261.5, the enhanced hazardous waste management program implemented by Respondents at Whole Foods Market Stores, as referenced in Paragraphs 27

through 29 and Appendices B through E of this CAFO, generally seeks to satisfy the hazardous waste generator requirements applicable to Small Quantity Generators (“SQGs”) and, therefore, goes above and beyond the minimum requirements applicable under the law.

27. As a condition of settlement, Respondents agree to implement the following measures as part of their enhanced hazardous waste management program:

- a. If applicable, Respondents shall obtain an EPA identification number for a Whole Foods Market Store pursuant to 40 C.F.R. § 262.12.
- b. Respondents must make a hazardous waste determination on all solid waste generated in its Stores pursuant to 40 C.F.R. § 262.11. As a means of complying with this requirement, Respondents have implemented, and will continue to implement Regional and/or State-specific hazardous waste determination guidance charts. These Regional and/or State-specific hazardous waste determination guidance charts are described and set forth in Appendix B of this CAFO. These charts are marked as and considered Confidential Business Information pursuant to 40 C.F.R. Part 2.
- c. To the extent Consumer Products become hazardous waste, Respondents have implemented, and will continue to implement a system to properly accumulate and store hazardous waste on-site, including, but not limited to, inspections and management of containers. This system, commonly referred to as the “bucket” or “tote” system, accumulates and stores hazardous waste until it is picked up by a licensed hazardous waste hauler for proper off-site transport and disposal. Under this system, Respondents maintain records, such as manifests, to demonstrate proper off-site transport and disposal at their Stores. The “bucket” or “tote” system

and the associated quick-reference materials for Retail Associates are further described and set forth in Appendix C of this CAFO. This system is marked as and considered Confidential Business Information pursuant to 40 C.F.R. Part 2.

- d. Respondents have implemented, and will continue to implement hazardous waste management trainings at its Stores for all Retail Associates. The hazardous waste management training materials for Retail Associates are further described in Appendix D of this CAFO. The training materials are marked as and considered Confidential Business Information pursuant to 40 C.F.R. Part 2.

28. Respondents shall continue their efforts to implement an electronic hazardous waste identification system as follows:

- a. Respondents will consult a third-party to review the Consumer Products at its Stores, and determine whether those Consumer Products, if discarded, would become hazardous waste pursuant to federal and state law and regulations.
- b. After the potentially hazardous items are identified, Whole Foods Market shall implement the electronic hazardous waste identification system to the maximum extent that Whole Foods Market determines it is operationally and technologically feasible. The third-party consultant or other qualified personnel will load the information into Respondents' electronic hazardous waste identification system for use at Whole Foods Market Stores in identifying and classifying all solid waste streams, which may include the use of hand-held scanners, in-store computer terminal, or other computer-based system(s).

29. In order to assist its Stores in implementing Respondents' enhanced hazardous waste management program described in Paragraph 27 of this CAFO, Respondents will develop

and implement standard operating procedures (“SOPs”) for use by Retail Associates at their Stores. These SOPs will be available and accessible to Retail Associates. These procedures are further described in Appendix E of this CAFO. The SOPs are marked as and considered Confidential Business Information pursuant to 40 C.F.R. Part 2.

30. No later than March 31, 2018, and annually thereafter until termination of this CAFO, Respondents must submit an annual report to EPA for the preceding calendar year that shall include: implementation progress of its electronic hazardous waste identification system described in Paragraph 28, including a description of the technology used for the system, and any other Global-Level² revisions to the Appendices of this CAFO. These annual reports will be marked as and considered Confidential Business Information pursuant to 40 C.F.R. Part 2.

31. Respondents’ third party audit procedures are further described in Appendix F of this CAFO. The Third Party Audit procedures are marked as and considered Confidential Business Information pursuant to 40 C.F.R. Part 2.

32. In all instances in which this CAFO requires written submission to EPA, each submission must be signed by a responsible corporate officer of Whole Foods Market and include the following certification:

I certify under penalty of law that I have personally examined and am familiar with the information submitted in this document and all documents submitted herewith; and that, to the best of my knowledge and belief, the submitted information is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine or imprisonment.

² “Global-Level” shall be defined as any change to this CAFO’s Appendices instituted and/or approved by Whole Foods Market’s Global Legal Team.

B. Civil Penalty

33. Respondents agree to pay a civil penalty in the sum of \$500,000.00 within thirty (30) days of the Effective Date of this CAFO.

34. Respondents must pay the assessed civil penalty by either cashier's check, certified check, or wire transfer, made payable to: **Treasurer, United States of America**. Payment must be remitted in one of three (3) ways: regular U.S. Postal mail (including certified mail), overnight mail, or wire transfer. For regular U.S. Postal mail, U.S. Postal Service certified mail, or U.S. Postal Service express mail, the check should be remitted to:

United States Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, Missouri 63197-9000

For overnight mail (non-U.S. Postal Service, e.g. Fed Ex), the check should be remitted to:

U.S. Bank
Government Lockbox 979077
U.S. EPA Fines and Penalties
1005 Convention Plaza
SL-MO-C2-GL
St. Louis, Missouri 63101
Phone No. (314) 425-1818

For wire transfer, the payment should be remitted to:

Federal Reserve Bank of New York
ABA Routing Number: 021030004
Account Number: 68010727
SWIFT address: FRNYUS33
33 Liberty Street
New York, NY 10045
Field Tag 4200 of the Fedwire message should read: "D 68010727 Environmental Protection Agency"

The case name and document number (In the Matter of Whole Foods Market Group, Inc., et. al., Docket No. RCRA-HQ-2016-____) must be clearly documented on or within Respondents' chosen method of payment to ensure proper credit.

35. Respondents shall submit a copy of the payment to the following addresses:

U.S. Environmental Protection Agency
Clerk of the Board
Environmental Appeals Board
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460-0001

Laura Welles, Attorney-Advisor
Waste and Chemical Enforcement Division
Office of Civil Enforcement
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W. (MC 2249A)
Washington, D.C. 20460

36. Penalties paid pursuant to this CAFO are not deductible for federal purposes under 26 U.S.C. § 162(f).

37. Pursuant to 31 U.S.C. § 3717 and 40 C.F.R. § 13.11, unless otherwise prohibited by law, EPA will assess interest and late payment penalties on debts owed to the United States and a charge to cover the costs of processing and handling the delinquent claim. Interest on the civil penalty assessed in this CAFO will begin to accrue thirty (30) days after the effective date of the CAFO and will be recovered by EPA on any amount of the civil penalty that is not paid by the respective due date. In accordance with 31 U.S.C. § 3717 and 40 C.F.R. § 13.11, Respondents must pay the following amounts on any amount overdue:

- a. Interest. Any unpaid portion of a civil penalty must bear interest at the rate established by the Secretary of the Treasury pursuant to 31 U.S.C. § 3717(a)(1). Interest will therefore begin to accrue on a civil penalty or stipulated penalty if it is

not paid by the last date required. Interest will be assessed at the rate of the United States Treasury tax and loan rate in accordance with 40 C.F.R. § 13.11(a).

- b. Monthly Handling Charge. Respondents must pay a late payment handling charge of fifteen (\$15.00) on any late payment, with an additional charge of \$15.00 for each subsequent thirty (30) day period over which an unpaid balance remains.
- c. Non-payment Penalty. On any portion of a civil penalty more than ninety (90) days past due, Respondents must pay a non-payment penalty charge of six percent (6%) per annum, which will accrue from the date the penalty payment became due and is not paid. 40 C.F.R. § 13.11(c). This non-payment penalty charge is in addition to charges which accrue or may accrue under subparagraphs (a) and (b).

C. Supplemental Environmental Project

38. [Terms TBD]

D. Delay in Performance/Stipulated Penalties

39. Upon written notice of an alleged violation of the requirements set forth in Section VI.C. (Supplemental Environmental Project) of this CAFO or of the applicable federal hazardous waste regulations set forth in 40 Code of Federal Regulations Parts 260-279, Respondents shall have nine (9) days to cure the alleged violation. In the event Respondents fail to cure the alleged violation within the nine (9) day time period, Respondents shall be liable for stipulated penalties to the EPA, as specified below.

Period of Failure to Comply	Penalty Per Violation Per Day
10th through 20 th day	\$100.00
21st through 30 th day	\$250.00
Greater than 30 days	\$500.00

40. Payment of stipulated penalties will not alter in any way Whole Foods Market's obligation to comply with the requirements of this CAFO.

VII. DISPUTE RESOLUTION

41. The dispute resolution procedures set forth in this Section shall be the exclusive mechanism to resolve any disputes arising under or with respect to this CAFO.

42. The Parties agree to meet and confer informally and in good faith to resolve all disputes arising from this CAFO. If Respondents disagree, in whole or in part, with any decision by EPA regarding this CAFO, Respondents agree to notify EPA, through the Chief of the Waste Enforcement Branch, and the Parties agree to use best efforts to informally and in good faith resolve their dispute. If EPA disagrees, in whole or in part, with any action or inaction taken by a Respondent under this CAFO, EPA agrees to notify Respondent, and the Parties agree to use their best efforts to informally and in good faith resolve their dispute within thirty (30) days. If the Parties are unable to resolve their dispute informally, and both Parties agree they have reached an impasse, they shall submit the dispute to a neutral third party mediator selected and agreed upon by the Parties and the Parties shall participate in non-binding mediation consistent with 40 C.F.R. 22.18(d).

VIII. OTHER MATTERS

43. Nothing in this CAFO shall relieve Respondents of the duty to comply with all applicable provisions of RCRA and any other federal, state, or local laws and regulations.

44. Notwithstanding any other provision of this CAFO, nothing in this CAFO shall be construed to limit the authority of the EPA to take any action against Respondents to address conditions that may present an imminent and substantial endangerment to human health or the

environment. Complainant reserves the right to take enforcement action against Respondents for any future violations of RCRA and the implementing regulations and to enforce the terms and conditions of this CAFO.

45. EPA and Respondents agree that Respondents' have no obligations under this Consent Agreement should it be rejected by the Environmental Appeals Board (the "EAB"); provided, however, that in the event that the EAB expresses any objections to, or its intent to reject this Consent Agreement, the Parties agree that they shall exercise their mutual best efforts to address and resolve the EAB's objections. The parties shall have the right to withdraw from this CAFO in the event they are unable to reach agreement on the EAB's proposed changes or objections.

46. This CAFO may be amended or modified only by written agreement executed by both the EPA and each Respondent.

47. The terms of this CAFO binds the Parties and their successors and assigns.

48. The undersigned representative of each party to this CAFO certifies that each is duly authorized by the party whom he or she represents to enter into these terms and conditions and to legally bind that party to it.

49. Unless otherwise specified herein, whenever notice is required to be given, whenever a report or other document is required to be forwarded by one party to another, or whenever a submission or demonstration is required to be made, it must be directed to the individuals specified below at the addresses given, unless these individuals or their successors give notice in writing to the other parties that another individual has been designated to receive the communication:

Complainant:

Chief, Waste Enforcement Branch
Waste and Chemical Enforcement Division
Office of Civil Enforcement
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W. (MC 2249A)
Washington, D.C. 20460

Respondents:

Whole Foods Market Central Office
Attn: John H. Hempfling II
550 Bowie Street
Austin, TX 78703

With copy to:

King Williams LLP
Attn: Jennifer Hartman King
520 Capitol Mall, Ste 750
Sacramento, CA 95814

50. At such time as the Respondents believe they have completed all of the requirements of this CAFO, Respondents shall so certify in writing and in accordance with the certification language set forth in Paragraph 32. Within sixty (60) days of EPA's receipt of Respondents' certification, EPA shall notify Respondents in writing whether EPA agrees that Respondents have completed all requirements, or if EPA does not agree it shall identify the basis for its position. If EPA does not agree with Whole Foods Market's certification, Whole Foods Market shall address the matters identified in EPA's objection, and may thereafter recertify completion of the CAFO. Upon notification by EPA that it agrees with Respondents' certification, or if EPA does not respond within sixty (60) days, Respondents' liability for federal civil penalties only is resolved for the violations alleged in Section V (EPA Allegations and Determinations) of this CAFO. This CAFO does not affect the right of EPA or the United States from taking action as provided by 40 C.F.R. 22.18(c).

51. The headings in this CAFO are for convenience of reference only and shall not affect the interpretation of this CAFO.

52. The Parties to this CAFO shall bear their own costs and attorneys' fees in this matter.

53. This CAFO and the attached proposed Final Order shall become effective upon execution of the Final Order by EAB and filing with the Clerk of the EAB ("Effective Date"). 40 C.F.R. §§ 22.18(b)(2) and 22.31(b).

AGREED AND CONSENTED TO:

FOR COMPLAINANT:

Date: _____

Greg Sullivan, Acting Director
Waste and Chemical Enforcement Division
Office of Civil Enforcement
Office of Enforcement and Compliance Assurance
United States Environmental Protection Agency

Date: _____

(Counsel for Complainant)
Waste and Chemical Enforcement Division
Office of Civil Enforcement
Office of Enforcement and Compliance Assurance
United States Environmental Protection Agency

FOR RESPONDENT WHOLE FOODS MARKET GROUP, INC.:

Date: _____

FOR RESPONDENT WHOLE FOODS MARKET CALIFORNIA, INC.:

Date: _____

FOR RESPONDENT MRS. GOOCH'S FOOD MARKETS, INC.:

Date: _____

FOR RESPONDENT WHOLE FOODS MARKET PACIFIC NORTHWEST, INC.:

Date: _____

FOR RESPONDENT WHOLE FOODS MARKET ROCKY MOUNTAIN/SOUTHWEST, L.P.:

Date: _____

FOR RESPONDENT WFM NORTHERN NEVADA, INC.:

Date: _____

FOR RESPONDENT WFM SOUTHERN NEVADA, INC.:

Date: _____

FOR RESPONDENT WFM HAWAII, LLC:

Date: _____

FOR RESPONDENT WFM KANSAS, LLC:

Date: _____

FOR RESPONDENT WFM-WO, INC:

Date: _____

Appendix G

Replacement of Lighting Ballasts and Light Bulbs in Public Schools and Community Centers

1. Whole Foods Market shall provide for the removal and proper disposal of fluorescent lighting ballasts that contain polychlorinated biphenyls (PCBs) and the replacement and installation of new energy-efficient, PCB-free replacement lighting ballasts and light bulbs for public schools and/or community centers, as provided in this Appendix (“School Lighting Replacement SEP” or “SEP”). The focus of the School Lighting Replacement SEP is to protect the environment and public health by facilitating the safe identification, removal, and disposal of fluorescent lighting ballasts containing PCBs, and to replace them with energy efficient, non-PCB containing lighting fixtures. The School Lighting Replacement SEP shall: seek to reduce the use of lighting ballasts that contain PCBs in schools and/or community centers serving children (persons under the age of 18), including day-care centers and early childhood centers; ensure that equipment containing PCBs that is removed in this project is handled and disposed (removed from commerce) in accordance with applicable federal regulations set forth in 40 C.F.R. Part 761; and reduce energy demand through installation of energy-efficient lighting that contributes towards reduction in compounded toxics in the energy sector. Whole Foods Market shall also provide training to the school and community center personnel who handle hazardous waste. The training shall address the proper identification, handling and disposal of hazardous wastes located and used in the schools and community centers where this SEP is performed.

2. Whole Foods Market shall expend \$2.75 million to implement this SEP.

3. To identify public schools and/or community centers in which to perform this SEP, Whole Foods Market shall:

a. Identify candidate communities in which to perform this SEP that:

i. Have low- to moderate- income residents within the candidate community, which may be identified by reference to census block group and tract data, as calculated by the Department of Housing and Urban Development (see <https://www.hudexchange.info/programs/acs-low-mod-summary-data/acs-low-mod-summary-data-block-groups-places/>);

ii. Are within a 50-mile radius of a Whole Foods Market store covered by this CAFO; and

iii. Have one or more public school and/or community center facilities located within the candidate community (*e.g.* within the census block group and tract).

b. Consult with the relevant public school district or other state or local authority with jurisdiction over the school or community center facilities to identify facilities which have or are likely to have lighting ballasts that contain PCBs (likely for

schools or community centers built before 1979 that have not had extensive lighting retrofits since 1979 and are using T-12 magnetic lighting ballasts). Priority for lighting ballast replacement should be given to those schools or centers with a significant number of children who qualify for a reduced or free lunch program.

Schools or community centers to be selected for lighting replacements and training under this SEP shall be located in the regions of the United States (*e.g.*, Northeast, Mid-Atlantic, Pacific Northwest, etc.) where Whole Foods Market Stores are located, as identified in Paragraph 1 of the CAFO and listed in Appendix A.

4. All replacement lighting ballasts and light bulbs shall be electronic and shall have an energy efficiency that is equivalent to or better than T-8 (based on energy efficiency standards set by the U. S. Department of Energy) with preference given to LED light fixtures, if feasible.

5. Lighting ballasts removed under this SEP shall be assumed to have PCB waste and shall be properly disposed of in accordance with 40 C.F.R. Part 761, unless such ballasts are clearly marked or labeled to have no PCBs.

6. Whole Foods Market is responsible for the satisfactory completion of this SEP in accordance with the requirements of this Appendix. Whole Foods Market may use contractors or consultants in planning and implementing this SEP.

7. The School Lighting Replacement SEP shall be completed within three (3) years after the Effective Date of this CAFO; however, this date may be extended by mutual agreement between Whole Foods Market and EPA in writing.

8. Upon completion of this SEP, Whole Foods Market shall submit to EPA a "SEP Completion Report" no later than ninety (90) days from the date of the SEP's completion. The SEP Completion Report shall contain, at a minimum:

a. A detailed description of the School Lighting Replacement SEP as completed, including the number and locations of the schools and/or community centers addressed under this SEP along with the number of fixtures with replaced lighting at each school and/or center;

b. A description of how low- or moderate-income communities meeting the criteria in Paragraph 3.a were identified;

c. Records demonstrating that the lighting ballasts were properly disposed of in accordance with 40 C.F.R. Part 761;

d. The dates and locations of each training session provided for school and community center personnel, the number of personnel receiving such training, and a summary description or course outline of the training;

e. A description of any problem(s) encountered in completing the SEP and their solution(s);

f. An itemized list and/or documentation of all SEP costs expended;

g. Evidence or information documenting the SEP's completion (which may include, but is not limited to, photos, vendor invoices or receipts, correspondence from SEP recipients, etc.); and

h. To the extent possible, a statement of the benefits associated with this SEP as implemented and an explanation of how such benefits were measured or estimated.

The SEP Completion Report must be certified by an appropriate corporate official, and a certificate stating:

"I certify that the project has been fully implemented pursuant to the provisions of the Consent Agreement and Final Order in *In the Matter of Whole Foods Market Group, Inc., et al.*, EPA Docket No. RCRA-HQ-2016-____, that I am familiar with the information in this document, and that, based on my inquiry of those individuals responsible for obtaining the information, it is true and complete to the best of my knowledge. I know that there are significant penalties for submitting false information, including the possibility of fines and imprisonment for knowing violations."

9. EPA may require information in addition to that described in the preceding Paragraph, in order to evaluate Whole Foods Market's completion of the SEP. After receiving the SEP Completion Report, EPA shall notify Whole Foods Market in writing within sixty (60) days whether it agrees that the SEP is satisfactorily completed, or if EPA does not agree it shall identify the basis for its position. "Satisfactorily completed" means completion of this SEP in accordance with the provisions of this Appendix G. If EPA does not agree that Whole Foods Market has satisfactorily completed the SEP, Whole Foods Market shall address the matters identified in EPA's objection, and may thereafter recertify completion of the SEP. Upon notification by EPA that it agrees with Respondents' certification, or if EPA does not respond within sixty (60) days, Whole Foods Market shall have no further obligations under this SEP.

10. Whole Foods Market certifies the truth and accuracy of each of the following:

a. that, as of the date of executing this CAFO, Whole Foods Market is not required to perform or develop any SEP in this Appendix by any federal, state, or local law or regulation and is not required to perform or develop this SEP by agreement, grant, or as injunctive relief awarded in any other action in any forum;

b. that the SEP is not a project that Whole Foods Market was planning or intending to construct, perform, or implement other than in settlement of the claims resolved in this CAFO;

c. that Whole Foods Market has not received and will not receive credit for this SEP in any other enforcement action; and

d. that Whole Foods Market will not receive any reimbursement for any portion of this SEP from any other person.

11. Whole Foods Market further certifies that it is not a party to any open federal financial assistance that is funding or could be used to fund the same activity as this SEP, and that to the best Whole Foods Market's knowledge and belief after reasonable inquiry, there is no

such open federal financial transaction that is funding or could be used to fund the same activity as this SEP, nor has the same activity been described in an unsuccessful federal financial assistance transaction proposal to EPA within two years of the date of this settlement (unless the project was barred from funding as statutorily ineligible). For purposes of this certification, the term “open federal financial assistance” refers to a grant, cooperative agreement, loan, federally-guaranteed loan guarantee, or other mechanism for providing federal financial assistance whose performance period has not yet expired.

12. Disputes concerning the satisfactory performance of this SEP may be resolved under Section VII of this CAFO (Dispute Resolution).

13. Any public statement, oral or written in print, film, or other media, made by Whole Foods Market making reference to this SEP shall include the following language: “This project was undertaken in connection with the settlement of an enforcement action, *In the Matter of Whole Foods Market Group, Inc., et al.*, EPA Docket No. RCRA-HQ-2016-____, to enforce federal laws.”

14. For federal income tax purposes, Whole Foods Market agrees that it will neither capitalize into inventory or basis nor deduct any costs or expenditures incurred in performing this SEP.

In the body of the CAFO (Sec IV.C), insert the following for Paragraph 38:

~~38. Whole Foods Market shall implement the Supplemental Environmental Project as specified in Appendix [X] of this CAFO.~~

~~Appendix [X]~~

Appendix G

Replacement of Lighting Ballasts and Light Bulbs in Public Schools and Community Centers

1. Whole Foods Market shall provide for the removal and proper disposal of fluorescent lighting ballasts that ~~may contain~~ polychlorinated biphenyls (PCBs) and the replacement and installation of new energy-efficient, PCB-free replacement lighting ballasts and light bulbs for public schools and/or community centers, as provided in this Appendix (“School Lighting Replacement SEP” or “SEP”). The focus of the School Lighting Replacement SEP is to protect the environment and public health by facilitating the safe identification, removal, and disposal of fluorescent lighting ballasts ~~that may contain~~ containing PCBs, and ~~their replacement to replace them~~ with energy efficient, non-toxic ~~alternative~~ PCB containing lighting fixtures. The School Lighting Replacement SEP shall: seek to reduce the use of lighting ballasts that ~~may contain~~ PCBs in schools and/or community centers serving children (persons under the age of 18), including day-care centers and early childhood centers; ensure that equipment ~~that may contain~~ containing PCBs that is removed in this project is handled and disposed (removed from commerce) in accordance with applicable federal regulations ~~under set forth in~~ 40 C.F.R. Part 761; and reduce energy demand through installation of energy-efficient lighting that contributes towards reduction in compounded toxics in the energy sector. Whole Foods Market shall also provide training to the ~~appropriate school and community center personnel~~ who handle hazardous waste. The training shall address the proper identification, handling and disposal of hazardous wastes located and used in the schools and community centers where this SEP is performed.

2. Whole Foods ~~Markets~~ Market shall expend \$2.75 million to implement this SEP.

3. To identify public schools and/or community centers in which to perform this SEP, Whole Foods Market shall:

a. Identify candidate communities in which to perform this SEP ~~based on the following criteria that:~~

~~The percentage of~~

i. Have low- to moderate- income residents within the candidate community, which may be identified by reference to census block group and tract data, as calculated by the Department of Housing and Urban Development (see

<https://www.hudexchange.info/programs/acs-low-mod-summary-data/acs-low-mod-summary-data-block-groups-places/>);

- ii. Are within a 50-mile radius of a Whole Foods Market store covered by this CAFO; and
- iii. Have one or more public school and/or community center facilities located within the candidate community (*e.g.*, within the census block group and tract).

b. Consult with the relevant public school district or other state or local authority with jurisdiction over the school or community center facilities to identify facilities which have or are likely to have lighting ballasts that ~~may~~ contain PCBs (likely for schools or community centers built before 1979 that have not had extensive lighting retrofits since 1979 and are using T-12 magnetic lighting ballasts). Priority for lighting ballast replacement should be given to those schools or centers with a significant number of children who qualify for a reduced or free lunch program.

Schools or community centers to be selected for lighting replacements and training under this SEP shall be located in ~~each region~~ the regions of the United States (*e.g.*, Northeast, Mid-Atlantic, Pacific Northwest, etc.) where Whole Foods Market Stores are located, as identified in Paragraph 1 of the CAFO and listed in Appendix A.

4. All replacement lighting ballasts and light bulbs shall be electronic and shall have an energy efficiency that is equivalent to or better than T-8 (based on energy efficiency standards set by the U. S. Department of Energy) with preference given to LED light fixtures, if feasible.

5. Lighting ballasts removed under this SEP shall be assumed to have PCB waste and shall be properly disposed of in accordance with 40 C.F.R. Part 761, unless such ballasts are clearly marked or labeled to have no PCBs.

6. Whole Foods Market is responsible for the satisfactory completion of this SEP in accordance with the requirements of this Appendix. Whole Foods Market may use contractors or consultants in planning and implementing this SEP.

7. The School Lighting Replacement SEP shall be completed within ~~(X)three (3)~~ years after the Effective Date of this CAFO; however, this date may be extended by mutual agreement ~~of~~ between Whole Foods Market and EPA in writing.

8. Upon completion of this SEP, Whole Foods Market shall submit to EPA a "SEP Completion Report" no later than ~~thirty (30)~~ ninety (90) days from the date of the SEP's completion. The SEP Completion Report shall contain, at a minimum:

- a. A detailed description of the School Lighting Replacement SEP as completed, including the number and locations of the schools and/or community centers addressed under this SEP along with the number of fixtures with replaced lighting at each school and/or center;

- b. A description of how low- or moderate-income communities meeting the criteria in Paragraph 3.a were identified;
- c. Records demonstrating that the lighting ballasts were properly disposed of in accordance with 40 C.F.R. Part 761;
- d. The dates and locations of each training session provided for school and community center personnel, the number of personnel receiving such training, and a summary description or course outline of the training;
- e. A description of any problem(s) encountered in completing the SEP and their solution(s);
- f. An itemized list and/or documentation of all SEP costs expended;
- g. Evidence or information documenting the SEP's completion (which may include, but is not limited to, photos, vendor invoices or receipts, correspondence from SEP recipients, etc.); and
- h. To the extent possible, a statement of the benefits associated with this SEP as implemented and an explanation of how such benefits were measured or estimated.

The SEP Completion Report must be certified by an appropriate corporate official, and a certificate stating:

"I certify that the project has been fully implemented pursuant to the provisions of the Consent Agreement and Final Order in *In the Matter of Whole Foods Market Group, Inc., et al.*, EPA Docket No. RCRA-HQ-2016-_____, that I am familiar with the information in this document, and that, based on my inquiry of those individuals responsible for obtaining the information, it is true and complete to the best of my knowledge. I know that there are significant penalties for submitting false information, including the possibility of fines and imprisonment for knowing violations."

9. EPA may require information in addition to that described in the preceding Paragraph, in order to evaluate Whole Foods Market's completion of the SEP. After receiving the SEP Completion Report, EPA shall notify Whole Foods Market in writing within sixty (60) days whether it agrees that the SEP is satisfactorily completed, or if EPA does not agree it shall identify the basis for its position. "Satisfactorily completed" means completion of this SEP in accordance with the provisions of this Appendix ~~X~~G. If EPA does not agree that Whole Foods Market has satisfactorily completed the SEP, Whole Foods Market shall address the matters identified in EPA's objection, and may thereafter recertify completion of the SEP. Upon notification by EPA that it agrees with Respondents' certification, or if EPA does not respond within sixty (60) days, Whole Foods Market shall have no further obligations under this SEP.

10. Whole Foods Market certifies the truth and accuracy of each of the following:

- a. that, as of the date of executing this ~~Decree~~CAFO, Whole Foods Market is not required to perform or develop any ~~SEPs~~SEP in this ~~CAFO~~Appendix by any federal, state, or local law or regulation and is not required to perform or develop ~~the SEPs~~this SEP by agreement, grant, or as injunctive relief awarded in any other action in any forum;

b. that the ~~SEPs are~~SEP is not a project~~(s)~~ that Whole Foods Market was planning or intending to construct, perform, or implement other than in settlement of the claims resolved in this CAFO; and

c. ~~that~~ that Whole Foods Market has not received and will not receive credit for ~~these SEPs~~this SEP in any other enforcement action; and

d. ~~that~~that Whole Foods Market will not receive any reimbursement for any portion of ~~these SEPs~~this SEP from any other person.

11. Whole Foods Market further certifies that it is not a party to any open federal financial assistance that is funding or could be used to fund the same activity as ~~the SEPs~~this SEP, and that to the best Whole Foods Market's knowledge and belief after reasonable inquiry, there is no such open federal financial transaction that is funding or could be used to fund the same activity as ~~these SEPs~~this SEP, nor has the same activity been described in an unsuccessful federal financial assistance transaction proposal to EPA within two years of the date of this settlement (unless the project was barred from funding as statutorily ineligible). For purposes of this certification, the term "open federal financial assistance" refers to a grant, cooperative agreement, loan, federally-guaranteed loan guarantee, or other mechanism for providing federal financial assistance whose performance period has not yet expired.

12. Disputes concerning the satisfactory performance of ~~the SEPs~~this SEP may be resolved under Section VII of this CAFO (Dispute Resolution).

13. Any public statement, oral or written in print, film, or other media, made by Whole Foods Market making reference to ~~the SEPs~~this SEP shall include the following language: "This project was undertaken in connection with the settlement of an enforcement action, *In the Matter of Whole Foods Market Group, Inc., et al.*, EPA Docket No. RCRA-HQ-2016-____, to enforce federal laws."

14. For federal income tax purposes, Whole Foods Market agrees that it will neither capitalize into inventory or basis nor deduct any costs or expenditures incurred in performing ~~the~~SEP>this SEP.

Message

From: Welles, Laura [Welles.Laura@epa.gov]
Sent: 1/11/2017 5:24:26 PM
To: Jennifer Hartman King [JHartmanKing@kingwilliamsllp.com]; John Hempfling (CE CEN) [John.Hempfling@wholefoods.com]
CC: Fogarty, Johnpc [Fogarty.Johnpc@epa.gov]
Subject: RE: EPA revisions to draft final EPA/WFM CAFO and Appendix F (third party audit)

We're reviewing the appendices today and I think the only one missing is the one about the SEP - Appendix G. Please send along to us.

Thanks,
Laura

Laura Welles
Attorney Advisor
Waste and Chemical Enforcement Division
Office of Civil Enforcement
U.S. Environmental Protection Agency
(202) 564-2754

From: Jennifer Hartman King [mailto:JHartmanKing@kingwilliamsllp.com]
Sent: Monday, January 09, 2017 6:01 PM
To: Welles, Laura <Welles.Laura@epa.gov>; John Hempfling (CE CEN) <John.Hempfling@wholefoods.com>
Cc: Fogarty, Johnpc <Fogarty.Johnpc@epa.gov>
Subject: RE: EPA revisions to draft final EPA/WFM CAFO and Appendix F (third party audit)

Received. Thank you very much. We will get to work reviewing this right away.

Jennifer Hartman King, Managing Partner



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[Click Here for King Williams LLP News and Alerts](#)

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From: Welles, Laura [mailto:Welles.Laura@epa.gov]
Sent: Monday, January 09, 2017 2:51 PM
To: Jennifer Hartman King <JHartmanKing@kingwilliamsllp.com>; John Hempfling (CE CEN)

<John.Hempfling@wholefoods.com>

Cc: Fogarty, Johnpc <Fogarty.Johnpc@epa.gov>

Subject: EPA revisions to draft final EPA/WFM CAFO and Appendix F (third party audit)

Hi John and Jennifer,

Thank you for revising the draft CAFO to reflect our discussions on 12/21/16. In reviewing the draft, we flagged a few items for minor edits. We also had a question about the corporate entities.

The minor edits/questions include:

- With regard to the corporate entities, we want to confirm that the CAFO contains the correct entities. When reviewing Appendix A last week, **Ex. 4 CBI**
Ex. 4 CBI
 - Nature's Heartland, Inc. (one store in Bedford, MA)
 - WFM Nebraska, LLC (one store in Lincoln, NE)
 - Whole Foods Market Group (listed without the "Inc." and want to make sure that this is a typo rather than another entity)
 - Whole Foods Market Lusher Court Frisco Co., LLC (one store in Frisco, CO)

Ex. 4 CBI

We just want to make sure that the CAFO captures the correct corporate entities—those that own/operate Stores covered by the CAFO.

- In paragraph 10.d we changed the regulatory range so it only covers the CBI portion of Part 2.
- As you'll find, we moved "Global-Level" from the footnote on page 12 to the definitions section. Since it's a definition, we thought it was consistent to place it here.

We also clarified that Global-Level changes are associated with any changes to the enhanced HW program (i.e., appendices B through E) and not the third party audit or SEP (Appendices F and G). See changes to definition of Global-Level and paragraph 30. We hope this makes sense to you.

- Paragraph 38 contains language that refers to the SEP in Appendix G.
- Paragraph 42, last sentence – we changed "both" to "the" to reflect that it could be more than EPA and one Respondent.

Also attached is the draft Appendix F or third party audit. As you'll find, we made a few changes to this document. They include:

Ex. 4 CBI

Ex. 4 CBI

Please review the above changes to the draft final CAFO and Appendix F and let us know if you have any questions/concerns or would like to discuss them further.

Thanks,
Laura

Laura Welles
Attorney Advisor
Waste and Chemical Enforcement Division
Office of Civil Enforcement
U.S. Environmental Protection Agency
(202) 564-2754

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**BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.**

IN THE MATTER OF:	)	EPA Docket No.
	)	RCRA-HQ-2017-_____
)	
)	
Whole Foods Market Group, Inc.,	)	Proceeding Under Section 3008(a) of the
Whole Foods Market California, Inc.,	)	Resource Conservation and Recovery Act,
Mrs. Gooch's Natural Food Markets, Inc.,	)	42 U.S.C. § 6928(a)
Whole Foods Market Pacific Northwest, Inc.,)	
Whole Foods Market Rocky Mountain/ Southwest, L.P.,)	
WFM Northern Nevada, Inc.,)	
WFM Southern Nevada, Inc.,)	
WFM Hawaii, LLC,)	
WFM Kansas, LLC, and)	
WFM-WO, Inc.)	
)	
RESPONDENTS.)	

Commented [W11]: Ex. 4 CBI
Ex. 4 CBI

Commented [W12]: See comment above.

127

CONSENT AGREEMENT AND FINAL ORDER

I. PRELIMINARY STATEMENT

1. Complainant, the United States Environmental Protection Agency ("EPA"), and Respondents, Whole Foods Market Group, Inc., a Delaware corporation, Whole Foods Market California, Inc., a California corporation, Mrs. Gooch's Natural Food Markets, Inc., a California corporation, Whole Foods Market Pacific Northwest, Inc., a Delaware Corporation, Whole Foods Market Rocky Mountain/Southwest, L.P., a Texas limited partnership, WFM Northern Nevada, Inc., a Delaware Corporation, WFM Southern Nevada, Inc., a Delaware Corporation, WFM Hawaii, LLC, a Hawaii limited liability company, WFM Kansas, LLC, a Kansas limited liability company, and WFM-WO, Inc. a Delaware corporation (collectively the "Respondents" or "Whole Foods Market"), hereby enter into this Consent Agreement ("Agreement" or "Consent

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Agreement”), and the attached proposed Final Order (collectively, the “CAFO”) before taking testimony and without adjudication of any issues of fact or law herein.

2. Complainant and Respondents, having conferred for the purposes of settlement pursuant to the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (“Consolidated Rules”), 40 C.F.R. § 22.18, and expressing a mutual desire to enter into a global agreement covering the Whole Foods Market Stores identified in Appendix A of this CAFO, which is attached hereto and incorporated by reference herein, have agreed to the execution of this CAFO. Respondents hereby agree to comply with the terms of this CAFO.

3. For the purposes of this CAFO and in accordance with the specific requirements for settlement set forth in 40 C.F.R. § 22.18(b)(2):

- a. Respondents admit the jurisdictional allegations set forth in this CAFO;
- b. Respondents neither admit nor deny the factual allegations and legal conclusions contained in this CAFO;
- c. Respondents consent to the assessment and payment of the civil penalty in the amount and by the method set forth in this CAFO;
- d. Respondents consent to the terms and conditions specified in the compliance provisions set forth in this CAFO; and
- e. Respondents consent to perform the Supplemental Environmental Project set forth in this CAFO.

4. The Respondents waive any right they may have to contest the allegations set forth in this CAFO and any right to appeal the proposed Final Order set forth herein. 40 C.F.R. §

22.18(b)(2). Respondents do not waive any claims or defenses Respondents have to the interpretation of this CAFO or its terms.

II. THE PARTIES

5. Gregory Sullivan, ~~Acting~~ Director, Waste and Chemical Enforcement Division, Office of Civil Enforcement, Office of Enforcement and Compliance Assurance, is authorized, by lawful delegation, to initiate and settle civil administrative actions brought pursuant to Section 3008(a) of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976 and the Hazardous and Solid Waste Amendments (“HSWA”) of 1984 (collectively, “RCRA”), 42 U.S.C. § 6928(a).

6. Respondents own and operate the Whole Foods Market Stores identified in Appendix A, as specified therein, of this CAFO.

III. JURISDICTION

7. The parties agree to the commencement and conclusion of this matter through the issuance of this CAFO, which is authorized pursuant to Section 3008(a) of RCRA, 42 U.S.C. § 6928(a) and the Consolidated Rules, 40 C.F.R. §§ 22.13(b) and 22.18(b)(2) and (3).

8. RCRA Subtitle C (42 U.S.C. § 6921 *et seq.*) and its implementing regulations, set forth in 40 C.F.R. Parts 260-279, comprise EPA’s RCRA hazardous waste program. Section 3006(b) of RCRA, 42 U.S.C. § 6926(b), allows the Administrator to authorize a state to administer its own hazardous waste program in lieu of the federal program when the Administrator finds that the state program meets certain conditions.¹ A violation of a state provision authorized pursuant

¹ Each of the Affected States and Territories described herein, with the exception of Iowa, have received authorization to administer the base RCRA hazardous waste program (requirements imposed by the Solid Waste Disposal Act prior to the Hazardous and Solid Waste Amendments of 1984) in lieu of the federal government’s program. Not all the Affected States and Territories described herein are authorized to administer the Universal Waste regulations at 40

to Section 3006 of RCRA, 42 U.S.C. § 6926, constitutes a violation of a requirement of Subtitle C, and is subject to the assessment of civil penalties and issuance of compliance orders by EPA as provided by Section 3008(a) of RCRA, 42 U.S.C. § 6928(a).

9. Pursuant to RCRA Section 3008(a)(2), 42 U.S.C. § 6928(a)(2), notice of the commencement of this action has been given to all Affected States and Territories.

IV. DEFINITIONS

10. Unless otherwise expressly provided herein, terms used in the CAFO that are defined in RCRA, 42 U.S.C. §§ 6901 *et seq.*, or in regulations promulgated under RCRA, 40 C.F.R. Parts 260-279, or in a state's authorized hazardous waste program, shall have the same meaning in this CAFO as such term has under RCRA or under federal or applicable authorized state regulations. In the case of a conflict between federal and state definitions, federal definitions shall control. Whenever terms defined below are used in this CAFO, such definitions shall apply:

- a. "Affected State and Territory" means a state or territory of the United States in which a Whole Foods Market Store is located as identified in Appendix A of this CAFO. Oklahoma, Texas, Louisiana, New Mexico, and Arkansas are not Affected States for purposes of this CAFO.
- b. "Business Day" means any day other than Saturday, Sunday, or a federal or legal holiday.
- c. "Conditionally Exempt Small Quantity Generator" means a facility that generates 100 kg of hazardous waste or less in a calendar month.

C.F.R. Part 273. Thus, where applicable, citations to the Code of Federal Regulations is a citation to the corresponding regulations contained within the Affected State's or Territory's authorized RCRA hazardous waste program.

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- d. "Confidential Business Information" or "CBI" shall have the same definition as in 40 C.F.R. §§ 2.201-2.311406.
- e. "Consent Agreement and Final Order" or "CAFO" shall mean this Consent Agreement and attached Final Order and all Appendices hereto. In the event of conflict between this Consent Agreement and any Appendix, this Consent Agreement shall control.
- f. "Consumer Products" shall mean any merchandise sold by Respondents at Whole Foods Market Stores, which if discarded, may have to be managed as RCRA hazardous waste.
- g. "Day" means a calendar day unless expressly stated to be a business day. In computing any period of time under this CAFO, where the last day would fall on a Saturday, Sunday, or federal, legal or Affected State or Territory holiday, the period shall run until the close of business of the next business day.
- h. "Effective Date" is defined in Section VIII of this CAFO.
- i. "EPA" means the United States Environmental Protection Agency.
- j. "Global Level" shall mean any change to this CAFO's Appendices B through E instituted and/or approved by Whole Foods Market's Global Legal Team.
- k. "Large Quantity Generator" means a facility that generates 1000 kg or more of hazardous waste in a calendar month.
- l. "Notify" and "Submit" and other terms signifying an obligation to transmit or communicate documents and information mean to deliver in person, send via electronic mail, deposit in the U.S. mail or dispatch by express courier so that such transmission or communication arrives to the designated recipient by close of business on the day

required by this CAFO. If that required day is not a Business Day then the delivery, deposit, or dispatch shall be made by the close of business the next Business Day.

~~h.m.~~ “Paragraph” shall mean a portion of this CAFO identified by an arabic numeral and, in some cases, an associated lower case letter.

~~m.n.~~ “Parties” shall mean Complainant and all Respondents.

~~n.o.~~ “RCRA” means the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 *et seq.*

~~p.p.~~ “Respondents” mean the entities described in Paragraphs 1 and 6 of this CAFO.

~~p.q.~~ “Retail Associate” means a Whole Foods Market Store employee, including store leadership and team members.

~~q.r.~~ “Section” shall mean a portion of this CAFO identified by a roman numeral.

~~r.s.~~ “Small Quantity Generator” means a facility that generates more than 100 kg and less than 1000 kg of hazardous waste in a calendar month.

~~s.t.~~ “Small Quantity Handler of Universal Waste” means a generator of universal waste that does not accumulate 5,000 kilograms or more of universal waste (e.g., batteries, mercury-containing equipment, or fluorescent lamps, calculated collectively) at any time. 40 C.F.R. § 273.9.

~~t.u.~~ “Solid Waste” means any discarded material that is not excluded under 40 C.F.R. § 261.4(a) or that is not excluded by variance granted under §§ 260.30 and 260.31.

~~u.v.~~ “Stores,” “Facilities,” or “Whole Foods Market Stores” mean Whole Foods Market retail grocery stores, or any future Whole Foods Market retail grocery store (including “365 by Whole Foods Market” stores), located in the United States (including Puerto Rico and other U.S. territories).

~~W-X~~.....“United States” means the United States of America, and all of its departments, agencies, and instrumentalities.

~~W-X~~.....“Universal Waste” means certain hazardous wastes that are subject to the universal waste requirements of 40 C.F.R. Part 273, including fluorescent lamps. 40 C.F.R. §§ 273.1 and 273.9.

V. EPA ALLEGATIONS AND DETERMINATIONS

11. Each Respondent is a “person” as defined in Section 1004(15) of RCRA, 42 U.S.C. § 6903(15) and 40 C.F.R. § 260.10.

12. Respondents own and operate the Stores identified in Appendix A, as specified therein, of this CAFO. The stores identified in Appendix A are “facilities” within the meaning of 40 C.F.R. § 260.10.

13. Respondents sell Consumer Products, some of which may become “solid waste” when they are returned, expired, spill or are in a condition such that they cannot be used for their intended purpose.

14. Some of the Consumer Products that become solid waste may be considered hazardous waste under federal or state law by having the characteristic of ignitability (D001), corrosivity (D002), or toxicity (D007, D010, D009, and D011).

15. Most, if not all, Whole Foods Market Stores generate 100 kilograms (“kg”) of hazardous waste or less in any given month, and therefore, are considered Conditionally Exempt Small Quantity Generators (“CESQGs”) pursuant to 40 C.F.R. § 261.5. As CESQGs, the Stores are exempt from regulation under the hazardous waste generator requirements at 40 C.F.R. Part 262 and the notification requirements of RCRA Section 3010 in any given month, provided that the requirements in 40 C.F.R. § 261.5 are met.

16. Between August 2014 and August 2015, EPA Region 6 conducted an investigation of Whole Food Company, Inc. and Respondent Whole Foods Market Rocky Mountain/Southwest, L.P.'s Stores located in Texas, Oklahoma, New Mexico, Louisiana and Arkansas (the "Investigation"). From the Investigation, EPA Region 6 concluded that a sufficient hazardous waste determination was not consistently made on all solid waste streams as required by 40 C.F.R. § 262.11(c), and one or more of the universal waste requirements set forth in 40 C.F.R. §§ 273.13 through 273.16 were not consistently complied with.

17. As a result of the Investigation, EPA Region 6, Whole Food Company, Inc. and Respondent Whole Foods Market Rocky Mountain/Southwest, L.P. entered into consent agreements and final orders for the Stores located within EPA Region 6's jurisdiction (the "Region 6 CAFOs").

18. Following the Investigation and Region 6 CAFOs, Respondents voluntarily contacted EPA and the Parties engaged in discussions that led to them agreeing to enter into a similar settlement agreement for Stores located in the Affected States and Territories, other than those covered by the Region 6 CAFOs. As part of the settlement discussions, Respondents informed EPA that there were no spills, leaks or releases at or from Respondents' Facilities, nor has EPA identified any such spills, leaks or releases.

19. The Parties' discussions have resulted in the agreement contained herein, which includes implementation of an enhanced hazardous waste management system in all of Respondents' Stores. This enhanced hazardous waste management system is designed to ensure the proper management of hazardous wastes at all Whole Foods Market Stores, and in many respects goes beyond the minimum requirements necessary for compliance with the applicable

federal and state hazardous waste laws and regulations. This program is more fully described in Paragraphs 27 through 29 of this CAFO and Appendices B through E.

20. Respondents have already taken steps toward implementing their enhanced hazardous waste management program, prior to the Effective Date of this CAFO.

Hazardous Waste Determinations

21. Pursuant to 40 C.F.R. § 262.11, a person who generates a solid waste is required to determine if that waste is hazardous.

22. Based upon the terms of the Region 6 CAFOs, and without a nationwide investigation, or any admission of liability or guilt by Respondents, EPA has concluded that Respondents did not make sufficient hazardous waste determinations at all Whole Foods Market Stores as required by 40 C.F.R. § 262.11.

Universal Waste Management

23. Pursuant to 40 C.F.R. § 273.10, a small quantity handler of universal waste must comply with the applicable requirements at 40 C.F.R. §§ 273.10 through 273.20.

24. Based upon the terms of the Region 6 CAFOs, and without a nationwide investigation, or any admission of liability or guilt by Respondents, EPA has concluded that Respondents did not sufficiently comply with some of the standards set forth in 40 C.F.R. §§ 273.13 through 273.16 at all Whole Foods Market Stores.

VI. TERMS OF SETTLEMENT

25. Based on the foregoing, the Parties agree to the entry of this Consent Agreement on the terms set forth herein.

A. Compliance Provisions

26. Although a majority of Whole Foods Market Stores may qualify as CESQGs in any given month, pursuant to 40 C.F.R. § 261.5, the enhanced hazardous waste management program implemented by Respondents at Whole Foods Market Stores, as referenced in Paragraphs 27 through 29 and Appendices B through E of this CAFO, generally seeks to satisfy the hazardous waste generator requirements applicable to Small Quantity Generators (“SQGs”) and, therefore, goes above and beyond the minimum requirements applicable under the law.

27. As a condition of settlement, Respondents agree to implement the following measures as part of their enhanced hazardous waste management program:

- a. If applicable, Respondents shall obtain an EPA identification number for a Whole Foods Market Store pursuant to 40 C.F.R. § 262.12.
- b. Respondents must make a hazardous waste determination on all solid waste generated in its Stores pursuant to 40 C.F.R. § 262.11. As a means of complying with this requirement, Respondents have implemented, and will continue to implement Regional and/or State-specific hazardous waste determination guidance charts. These Regional and/or State-specific hazardous waste determination guidance charts are described and set forth in Appendix B of this CAFO. These charts are marked as and considered Confidential Business Information pursuant to 40 C.F.R. Part 2.
- c. To the extent Consumer Products become hazardous waste, Respondents have implemented, and will continue to implement a system to properly accumulate and store hazardous waste on-site, including, but not limited to, inspections and management of containers. This system, commonly referred to as the “bucket” or “tote” system, accumulates and stores hazardous waste until it is picked up by a

licensed hazardous waste hauler for proper off-site transport and disposal. Under this system, Respondents maintain records, such as manifests, to demonstrate proper off-site transport and disposal at their Stores. The “bucket” or “tote” system and the associated quick-reference materials for Retail Associates are further described and set forth in Appendix C of this CAFO. This system is marked as and considered Confidential Business Information pursuant to 40 C.F.R. Part 2.

- d. Respondents have implemented, and will continue to implement hazardous waste management trainings at its Stores for all Retail Associates. The hazardous waste management training materials for Retail Associates are further described in Appendix D of this CAFO. The training materials are marked as and considered Confidential Business Information pursuant to 40 C.F.R. Part 2.

28. Respondents shall continue their efforts to implement an electronic hazardous waste identification system as follows:

- a. Respondents will consult a third-party to review the Consumer Products at its Stores, and determine whether those Consumer Products, if discarded, would become hazardous waste pursuant to federal and state law and regulations.
- b. After the potentially hazardous items are identified, Whole Foods Market shall implement the electronic hazardous waste identification system to the maximum extent that Whole Foods Market determines it is operationally and technologically feasible. The third-party consultant or other qualified personnel will load the information into Respondents’ electronic hazardous waste identification system for use at Whole Foods Market Stores in identifying and classifying all solid waste

streams, which may include the use of hand-held scanners, in-store computer terminal, or other computer-based system(s).

29. In order to assist its Stores in implementing Respondents' enhanced hazardous waste management program described in Paragraph 27 of this CAFO, Respondents will develop and implement standard operating procedures ("SOPs") for use by Retail Associates at their Stores. These SOPs will be available and accessible to Retail Associates. These procedures are further described in Appendix E of this CAFO. The SOPs are marked as and considered Confidential Business Information pursuant to 40 C.F.R. Part 2.

30. No later than March 31, 2018, and annually thereafter until termination of this CAFO, Respondents must submit an annual report to EPA for the preceding calendar year that shall include: implementation progress of its electronic hazardous waste identification system described in Paragraph 28, including a description of the technology used for the system, and any other Global-Level² revisions to the Appendices ~~B through E~~ of this CAFO. These annual reports will be marked as and considered Confidential Business Information pursuant to 40 C.F.R. Part 2.

31. Respondents' third party audit procedures are further described in Appendix F of this CAFO. The Third Party Audit procedures are marked as and considered Confidential Business Information pursuant to 40 C.F.R. Part 2.

32. In all instances in which this CAFO requires written submission to EPA, each submission must be signed by a responsible corporate officer of Whole Foods Market and include the following certification:

I certify under penalty of law that I have personally examined and am familiar with the information submitted in this document and all documents submitted herewith; and that, to the best of my knowledge and belief, the submitted information is true, accurate, and

² "Global-Level" shall be defined as any change to this CAFO's Appendices instituted and/or approved by Whole Foods Market's Global Legal Team.

complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine or imprisonment.

B. Civil Penalty

33. Respondents agree to pay a civil penalty in the sum of \$500,000.00 within thirty (30) days of the Effective Date of this CAFO.

34. Respondents must pay the assessed civil penalty by either cashier's check, certified check, or wire transfer, made payable to: **Treasurer, United States of America**. Payment must be remitted in one of three (3) ways: regular U.S. Postal mail (including certified mail), overnight mail, or wire transfer. For regular U.S. Postal mail, U.S. Postal Service certified mail, or U.S. Postal Service express mail, the check should be remitted to:

United States Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, Missouri 63197-9000

For overnight mail (non-U.S. Postal Service, e.g. Fed Ex), the check should be remitted to:

U.S. Bank
Government Lockbox 979077
U.S. EPA Fines and Penalties
1005 Convention Plaza
SL-MO-C2-GL
St. Louis, Missouri 63101
Phone No. (314) 425-1818

For wire transfer, the payment should be remitted to:

Federal Reserve Bank of New York
ABA Routing Number: 021030004
Account Number: 68010727
SWIFT address: FRNYUS33
33 Liberty Street
New York, NY 10045
Field Tag 4200 of the Fedwire message should read: "D 68010727 Environmental Protection Agency"

The case name and document number (In the Matter of Whole Foods Market Group, Inc., et. al., Docket No. RCRA-HQ-2017-____) must be clearly documented on or within Respondents' chosen method of payment to ensure proper credit.

35. Respondents shall submit a copy of the payment to the following addresses:

U.S. Environmental Protection Agency
Clerk of the Board
Environmental Appeals Board
~~Ariel Rios Building~~
1200 Pennsylvania Avenue, N.W. (MC 1103M)
Washington, D.C. 20460-0001

Laura Welles, Attorney-Advisor
Waste and Chemical Enforcement Division
Office of Civil Enforcement
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W. (MC 2249A)
Washington, D.C. 20460

36. Penalties paid pursuant to this CAFO are not deductible for federal purposes under 26 U.S.C. § 162(f).

37. Pursuant to 31 U.S.C. § 3717 and 40 C.F.R. § 13.11, unless otherwise prohibited by law, EPA will assess interest and late payment penalties on debts owed to the United States and a charge to cover the costs of processing and handling the delinquent claim. Interest on the civil penalty assessed in this CAFO will begin to accrue thirty (30) days after the Effective Date of the CAFO and will be recovered by EPA on any amount of the civil penalty that is not paid by the respective due date. In accordance with 31 U.S.C. § 3717 and 40 C.F.R. § 13.11, Respondents must pay the following amounts on any amount overdue:

- a. Interest. Any unpaid portion of a civil penalty must bear interest at the rate established by the Secretary of the Treasury pursuant to 31 U.S.C. § 3717(a)(1).
Interest will therefore begin to accrue on a civil penalty or stipulated penalty if it is

not paid by the last date required. Interest will be assessed at the rate of the United States Treasury tax and loan rate in accordance with 40 C.F.R. § 13.11(a).

- b. Monthly Handling Charge. Respondents must pay a late payment handling charge of fifteen (\$15.00) on any late payment, with an additional charge of \$15.00 for each subsequent thirty (30) day period over which an unpaid balance remains.
- c. Non-payment Penalty. On any portion of a civil penalty more than ninety (90) days past due, Respondents must pay a non-payment penalty charge of six percent (6%) per annum, which will accrue from the date the penalty payment became due and is not paid. 40 C.F.R. § 13.11(c). This non-payment penalty charge is in addition to charges which accrue or may accrue under subparagraphs (a) and (b).

C. Supplemental Environmental Project

38. Respondents shall implement the Supplemental Environmental Project in Appendix G of this CAFO. [Terms TBD]

D. Delay in Performance/Stipulated Penalties

39. Upon written notice of an alleged violation of the requirements set forth in Section VI.C. (Supplemental Environmental Project) of this CAFO or of the applicable federal hazardous waste regulations set forth in 40 Code of Federal Regulations Parts 260-279, Respondents shall have nine (9) days to cure the alleged violation. In the event Respondents fail to cure the alleged violation within the nine (9) day time period, Respondents shall be liable for stipulated penalties to the EPA, as specified below.

Period of Failure to Comply	Penalty Per Violation Per Day
10th through 20 th day	\$100.00
21st through 30 th day	\$250.00

Greater than 30 days	\$500.00
----------------------	----------

40. Payment of stipulated penalties will not alter in any way Whole Foods Market's obligation to comply with the requirements of this CAFO.

VII. DISPUTE RESOLUTION

41. The dispute resolution procedures set forth in this Section shall be the exclusive mechanism to resolve any disputes arising under or with respect to this CAFO.

42. The Parties agree to meet and confer informally and in good faith to resolve all disputes arising from this CAFO. If Respondents disagree, in whole or in part, with any decision by EPA regarding this CAFO, Respondents agree to notify EPA, through the Chief of the Waste Enforcement Branch, and the Parties agree to use best efforts to informally and in good faith resolve their dispute. If EPA disagrees, in whole or in part, with any action or inaction taken by a Respondent under this CAFO, EPA agrees to notify Respondent, and the Parties agree to use their best efforts to informally and in good faith resolve their dispute within thirty (30) days. If the Parties are unable to resolve their dispute informally, and ~~the~~^{both} Parties agree they have reached an impasse, they shall submit the dispute to a neutral third party mediator selected and agreed upon by the Parties and the Parties shall participate in non-binding mediation consistent with 40 C.F.R. 22.18(d).

VIII. OTHER MATTERS

43. Nothing in this CAFO shall relieve Respondents of the duty to comply with all applicable provisions of RCRA and any other federal, state, or local laws and regulations.

44. Notwithstanding any other provision of this CAFO, nothing in this CAFO shall be construed to limit the authority of the EPA to take any action against Respondents to address

conditions that may present an imminent and substantial endangerment to human health or the environment. Complainant reserves the right to take enforcement action against Respondents for any future violations of RCRA and the implementing regulations and to enforce the terms and conditions of this CAFO.

45. EPA and Respondents agree that Respondents' have no obligations under this Consent Agreement should it be rejected by the Environmental Appeals Board (the "EAB"); provided, however, that in the event that the EAB expresses any objections to, or its intent to reject this Consent Agreement, the Parties agree that they shall exercise their mutual best efforts to address and resolve the EAB's objections. The Parties shall have the right to withdraw from this CAFO in the event they are unable to reach agreement on the EAB's proposed changes or objections.

46. This CAFO may be amended or modified only by written agreement executed by both the EPA and each Respondent.

47. The terms of this CAFO binds the Parties and their successors and assigns.

48. The undersigned representative of each party to this CAFO certifies that each is duly authorized by the party whom he or she represents to enter into these terms and conditions and to legally bind that party to it.

49. Unless otherwise specified herein, whenever notice is required to be given, whenever a report or other document is required to be forwarded by one party to another, or whenever a submission or demonstration is required to be made, it must be directed to the individuals specified below at the addresses given, unless these individuals or their successors give notice in writing to the other parties that another individual has been designated to receive the communication:

Complainant:

Chief, Waste Enforcement Branch
Waste and Chemical Enforcement Division
Office of Civil Enforcement
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W. (MC 2249A)
Washington, D.C. 20460

Respondents:

Whole Foods Market Central Office
Attn: John H. Hempfling II
550 Bowie Street
Austin, TX 78703

With copy to:

King Williams LLP
Attn: Jennifer Hartman King
520 Capitol Mall, Ste 750
Sacramento, CA 95814

50. At such time as the Respondents believe they have completed all of the requirements of this CAFO, Respondents shall so certify in writing and in accordance with the certification language set forth in Paragraph 32. Within sixty (60) days of EPA's receipt of Respondents' certification, EPA shall notify Respondents in writing whether EPA agrees that Respondents have completed all requirements, or if EPA does not agree it shall identify the basis for its position. If EPA does not agree with Whole Foods Market's certification, Whole Foods Market shall address the matters identified in EPA's objection, and may thereafter recertify completion of the CAFO. Upon notification by EPA that it agrees with Respondents' certification, or if EPA does not respond within sixty (60) days, Respondents' liability for federal civil penalties only is resolved for the violations alleged in Section V (EPA Allegations and Determinations) of this CAFO. This CAFO does not affect the right of EPA or the United States from taking action as provided by 40 C.F.R. 22.18(c).

51. The headings in this CAFO are for convenience of reference only and shall not affect the interpretation of this CAFO.

52. The Parties to this CAFO shall bear their own costs and attorneys' fees in this matter.

53. This CAFO and the attached proposed Final Order shall become effective upon execution of the Final Order by EAB and filing with the Clerk of the EAB ("Effective Date"). 40 C.F.R. §§ 22.18(b)(2) and 22.31(b).

AGREED AND CONSENTED TO:

FOR COMPLAINANT:

Date: _____

Gregory Sullivan, ~~Acting~~ Director
Waste and Chemical Enforcement Division
Office of Civil Enforcement
Office of Enforcement and Compliance Assurance
United States Environmental Protection Agency

Date: _____

Laura Welles, Attorney-Advisor
(~~Counsel for Complainant~~)
Waste and Chemical Enforcement Division
Office of Civil Enforcement
Office of Enforcement and Compliance Assurance
United States Environmental Protection Agency

FOR RESPONDENT WHOLE FOODS MARKET GROUP, INC.:

Date: _____

FOR RESPONDENT WHOLE FOODS MARKET CALIFORNIA, INC.:

Date: _____

FOR RESPONDENT MRS. GOOCH'S FOOD MARKETS, INC.:

Date: _____

FOR RESPONDENT WHOLE FOODS MARKET PACIFIC NORTHWEST, INC.:

Date: _____

FOR RESPONDENT WHOLE FOODS MARKET ROCKY MOUNTAIN/SOUTHWEST, L.P.:

Date: _____

FOR RESPONDENT WFM NORTHERN NEVADA, INC.:

Date: _____

FOR RESPONDENT WFM SOUTHERN NEVADA, INC.:

Date: _____

FOR RESPONDENT WFM HAWAII, LLC:

Date: _____

FOR RESPONDENT WFM KANSAS, LLC:

Date: _____

FOR RESPONDENT WFM-WO, INC:

Date: _____

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[PAGE * MERGEFORMAT]

Message

From: Anna Brown [ABrown@kingwilliamslaw.com]
Sent: 1/19/2017 3:30:00 AM
To: Welles, Laura [Welles.Laura@epa.gov]
CC: Jennifer Hartman King [JHartmanKing@kingwilliamslaw.com]; John Hempfling (CE CEN) [John.Hempfling@wholefoods.com]; Fogarty, Johnpc [Fogarty.Johnpc@epa.gov]; Aminah Famili [AFamili@kingwilliamslaw.com]
Subject: [CONFIDENTIAL SETTLEMENT COMMUNICATION] WFM CAFO Appendices

Dear Ms. Welles,

The Dropbox link below will take you to all of the final CAFO appendices. Please let us know if you have any trouble accessing the documents.

<https://www.dropbox.com/sh/382hy6srfbrqcxx/AABWngyMY6h4EdHlzfQojTvOa?dl=0>

My best,

Anna Brown, Paralegal



520 Capitol Mall, Suite 750

Sacramento, CA 95814

916-379-7530 – Main phone

916-379-7531 – Direct dial

916-379-7535 – Fax

Email: ABrown@KingWilliamsLaw.com

Website: www.KingWilliamsLaw.com

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_____ This email and any transmission with it may contain privileged or otherwise confidential information. If you are not the intended recipient, or believe that you have received this communication in error, please advise the sender via reply email and delete the email you received.

**BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.**

IN THE MATTER OF:	)	EPA Docket No.
	)	RCRA-HQ-2017-0001
)	
)	
Whole Foods Market Group, Inc.,	)	Proceeding Under Section 3008(a) of the
Whole Foods Market California, Inc.,	)	Resource Conservation and Recovery Act,
Mrs. Gooch's Natural Food Markets, Inc.,	)	42 U.S.C. § 6928(a)
Whole Foods Market Pacific Northwest, Inc.,)	
Whole Foods Market Rocky Mountain/ Southwest, L.P.,)	
WFM Northern Nevada, Inc.,)	
WFM Southern Nevada, Inc.,)	
WFM Hawaii, LLC,)	
WFM Kansas, LLC,)	
WFM-WO, Inc.,)	
Nature's Heartland, Inc.,)	
WFM Nebraska, LLC, and)	
Whole Foods Market Lusher Court Frisco CO, LLC)	
RESPONDENTS.)	

CONSENT AGREEMENT AND FINAL ORDER

I. PRELIMINARY STATEMENT

1. Complainant, the United States Environmental Protection Agency ("EPA"), and Respondents, Whole Foods Market Group, Inc., a Delaware corporation, Whole Foods Market California, Inc., a California corporation, Mrs. Gooch's Natural Food Markets, Inc., a California corporation, Whole Foods Market Pacific Northwest, Inc., a Delaware corporation, Whole Foods Market Rocky Mountain/Southwest, L.P., a Texas limited partnership, WFM Northern Nevada, Inc., a Delaware corporation, WFM Southern Nevada, Inc., a Delaware corporation, WFM Hawaii, LLC, a Hawaii limited liability company, WFM Kansas, LLC, a Kansas limited liability company,

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[PAGE * MERGEFORMAT]

WFM-WO, Inc., a Delaware corporation, Nature's Heartland, Inc., a Massachusetts corporation, WFM Nebraska, LLC, a Delaware limited liability company, and Whole Foods Market Lusher Court Frisco CO, LLC a Delaware limited liability company (collectively the "Respondents" or "Whole Foods Market"), hereby enter into this Consent Agreement ("Agreement" or "Consent Agreement"), and the attached proposed Final Order (collectively, the "CAFO") before taking testimony and without adjudication of any issues of fact or law herein.

2. Complainant and Respondents, having conferred for the purposes of settlement pursuant to the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Consolidated Rules"), 40 C.F.R. § 22.18, and expressing a mutual desire to enter into a global agreement covering the Whole Foods Market Stores identified in Appendix A of this CAFO, which is attached hereto and incorporated by reference herein, have agreed to the execution of this CAFO. Appendix A is marked as and considered Confidential Business Information pursuant to 40 C.F.R. Part 2. Respondents hereby agree to comply with the terms of this CAFO.

3. For the purposes of this CAFO and in accordance with the specific requirements for settlement set forth in 40 C.F.R. § 22.18(b)(2):

- a. Respondents admit the jurisdictional allegations set forth in this CAFO;
- b. Respondents neither admit nor deny the factual allegations and legal conclusions contained in this CAFO;
- c. Respondents consent to the assessment and payment of the civil penalty in the amount and by the method set forth in this CAFO;
- d. Respondents consent to the terms and conditions specified in the compliance provisions set forth in this CAFO; and

e. Respondents consent to perform the Supplemental Environmental Project set forth in this CAFO.

4. The Respondents waive any right they may have to contest the allegations set forth in this CAFO and any right to appeal the proposed Final Order set forth herein. 40 C.F.R. § 22.18(b)(2). Respondents do not waive any claims or defenses Respondents have to the interpretation of this CAFO or its terms.

II. THE PARTIES

5. Gregory Sullivan, Director, Waste and Chemical Enforcement Division, Office of Civil Enforcement, Office of Enforcement and Compliance Assurance, is authorized, by lawful delegation, to initiate and settle civil administrative actions brought pursuant to Section 3008(a) of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976 and the Hazardous and Solid Waste Amendments (“HSWA”) of 1984 (collectively, “RCRA”), 42 U.S.C. § 6928(a).

6. Respondents own and operate the Whole Foods Market Stores identified in Appendix A, ~~as specified therein~~, of this CAFO.

III. JURISDICTION

7. The parties agree to the commencement and conclusion of this matter through the issuance of this CAFO, which is authorized pursuant to Section 3008(a) of RCRA, 42 U.S.C. § 6928(a) and the Consolidated Rules, 40 C.F.R. §§ 22.13(b) and 22.18(b)(2) and (3).

8. RCRA Subtitle C (42 U.S.C. § 6921 *et seq.*) and its implementing regulations, set forth in 40 C.F.R. Parts 260-279, comprise EPA’s RCRA hazardous waste program. Section 3006(b) of RCRA, 42 U.S.C. § 6926(b), allows the Administrator to authorize a state to administer its own hazardous waste program in lieu of the federal program when the Administrator finds that

the state program meets certain conditions.¹ A violation of a state provision authorized pursuant to Section 3006 of RCRA, 42 U.S.C. § 6926, constitutes a violation of a requirement of Subtitle C, and is subject to the assessment of civil penalties and issuance of compliance orders by EPA as provided by Section 3008(a) of RCRA, 42 U.S.C. § 6928(a).

9. Pursuant to RCRA Section 3008(a)(2), 42 U.S.C. § 6928(a)(2), notice of the commencement of this action has been given to all Affected States and Territories.

IV. DEFINITIONS

10. Unless otherwise expressly provided herein, terms used in the CAFO that are defined in RCRA, 42 U.S.C. §§ 6901 *et seq.*, or in regulations promulgated under RCRA, 40 C.F.R. Parts 260-279, or in a state's authorized hazardous waste program, shall have the same meaning in this CAFO as such term has under RCRA or under federal or applicable authorized state regulations. In the case of a conflict between federal and state definitions, federal definitions shall control. Whenever terms defined below are used in this CAFO, such definitions shall apply:

- a. "Affected State and Territory" means a state or territory of the United States in which a Whole Foods Market Store is located as identified in Appendix A of this CAFO. Oklahoma, Texas, Louisiana, New Mexico, and Arkansas are not Affected States for purposes of this CAFO.
- b. "Business Day" means any day other than Saturday, Sunday, or a federal or legal holiday.

¹ Each of the Affected States and Territories described herein, with the exception of Iowa, have received authorization to administer the base RCRA hazardous waste program (requirements imposed by the Solid Waste Disposal Act prior to the Hazardous and Solid Waste Amendments of 1984) in lieu of the federal government's program. Not all the Affected States and Territories described herein are authorized to administer the Universal Waste regulations at 40 C.F.R. Part 273. Thus, where applicable, citations to the Code of Federal Regulations is a citation to the corresponding regulations contained within the Affected State's or Territory's authorized RCRA hazardous waste program.

- c. “Conditionally Exempt Small Quantity Generator” means a facility that generates 100 kg of hazardous waste or less in a calendar month.
- d. “Confidential Business Information” or “CBI” shall have the same definition as in 40 C.F.R. §§ 2.201-2.311.
- e. “Consent Agreement and Final Order” or “CAFO” shall mean this Consent Agreement and attached Final Order and all Appendices hereto. In the event of conflict between this Consent Agreement and any Appendix, this Consent Agreement shall control.
- f. “Consumer Products” shall mean any merchandise sold by Respondents at Whole Foods Market Stores, which if discarded, may have to be managed as RCRA hazardous waste.
- g. “Day” means a calendar day unless expressly stated to be a business day. In computing any period of time under this CAFO, where the last day would fall on a Saturday, Sunday, or federal, legal or Affected State or Territory holiday, the period shall run until the close of business of the next business day.
- h. “Effective Date” is defined in Section VIII of this CAFO.
- i. “EPA” means the United States Environmental Protection Agency.
- j. “Global-Level” shall mean any change to this CAFO’s Appendices B through E instituted and/or approved by Whole Foods Market’s Global Legal Team.
- k. “Large Quantity Generator” means a facility that generates 1000 kg or more of hazardous waste in a calendar month.
- l. “Notify” and “Submit” and other terms signifying an obligation to transmit or communicate documents and information mean to deliver in person, send via electronic mail, deposit in the U.S. mail or dispatch by express courier so that such transmission

or communication arrives to the designated recipient by close of business on the day required by this CAFO. If that required day is not a Business Day then the delivery, deposit, or dispatch shall be made by the close of business the next Business Day.

- m. "Paragraph" shall mean a portion of this CAFO identified by an arabic numeral and, in some cases, an associated lower case letter.
- n. "Parties" shall mean Complainant and all Respondents.
- o. "RCRA" means the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 *et seq.*
- p. "Respondents" mean the entities described in Paragraphs 1 and 6 of this CAFO.
- q. "Retail Associate" means a Whole Foods Market Store employee, including store leadership and team members.
- r. "Section" shall mean a portion of this CAFO identified by a roman numeral.
- s. "Small Quantity Generator" means a facility that generates more than 100 kg and less than 1000 kg of hazardous waste in a calendar month.
- t. "Small Quantity Handler of Universal Waste" means a generator of universal waste that does not accumulate 5,000 kilograms or more of universal waste (e.g., batteries, mercury-containing equipment, or fluorescent lamps, calculated collectively) at any time. 40 C.F.R. § 273.9.
- u. "Solid Waste" means any discarded material that is not excluded under 40 C.F.R. § 261.4(a) or that is not excluded by variance granted under §§ 260.30 and 260.31.
- v. "Stores," "Facilities," or "Whole Foods Market Stores" mean Whole Foods Market retail grocery stores, or any future Whole Foods Market retail grocery store (including

“365 by Whole Foods Market” stores), located in the United States (including Puerto Rico and other U.S. territories).

- w. “United States” means the United States of America, and all of its departments, agencies, and instrumentalities.
- x. “Universal Waste” means certain hazardous wastes that are subject to the universal waste requirements of 40 C.F.R. Part 273, including fluorescent lamps. 40 C.F.R. §§ 273.1 and 273.9.

V. EPA ALLEGATIONS AND DETERMINATIONS

11. Each Respondent is a “person” as defined in Section 1004(15) of RCRA, 42 U.S.C. § 6903(15) and 40 C.F.R. § 260.10.

12. Respondents own and operate the Stores identified in Appendix A, ~~as specified therein,~~ of this CAFO. The stores identified in Appendix A are “facilities” within the meaning of 40 C.F.R. § 260.10.

13. Respondents sell Consumer Products, some of which may become “solid waste” when they are returned, expired, spill or are in a condition such that they cannot be used for their intended purpose.

14. Some of the Consumer Products that become solid waste may be considered hazardous waste under federal or state law by having the characteristic of ignitability (D001), corrosivity (D002), or toxicity (D007, D010, D009, and D011).

15. Most, if not all, Whole Foods Market Stores generate 100 kilograms (“kg”) of hazardous waste or less in any given month, and therefore, are considered Conditionally Exempt Small Quantity Generators (“CESQGs”) pursuant to 40 C.F.R. § 261.5. As CESQGs, the Stores are exempt from regulation under the hazardous waste generator requirements at 40 C.F.R. Part

262 and the notification requirements of RCRA Section 3010 in any given month, provided that the requirements in 40 C.F.R. § 261.5 are met.

16. Between August 2014 and August 2015, EPA Region 6 conducted an investigation of Whole Food Company, Inc. and Respondent Whole Foods Market Rocky Mountain/Southwest, L.P.'s Stores located in Texas, Oklahoma, New Mexico, Louisiana and Arkansas (the "Investigation"). From the Investigation, EPA Region 6 concluded that a sufficient hazardous waste determination was not consistently made on all solid waste streams as required by 40 C.F.R. § 262.11(c), and one or more of the universal waste requirements set forth in 40 C.F.R. §§ 273.13 through 273.16 were not consistently complied with.

17. As a result of the Investigation, EPA Region 6, Whole Food Company, Inc. and Respondent Whole Foods Market Rocky Mountain/Southwest, L.P. entered into consent agreements and final orders for the Stores located within EPA Region 6's jurisdiction (the "Region 6 CAFOs").

18. Following the Investigation and Region 6 CAFOs, Respondents voluntarily contacted EPA and the Parties engaged in discussions that led to them agreeing to enter into a similar settlement agreement for Stores located in the Affected States and Territories, other than those covered by the Region 6 CAFOs. As part of the settlement discussions, Respondents informed EPA that there were no spills, leaks or releases at or from Respondents' Facilities, nor has EPA identified any such spills, leaks or releases.

19. The Parties' discussions have resulted in the agreement contained herein, which includes implementation of an enhanced hazardous waste management system in all of Respondents' Stores. This enhanced hazardous waste management system is designed to ensure the proper management of hazardous wastes at all Whole Foods Market Stores, and in many

respects goes beyond the minimum requirements necessary for compliance with the applicable federal and state hazardous waste laws and regulations. This program is more fully described in Paragraphs 27 through 29 of this CAFO and Appendices B through E.

20. Respondents have already taken steps toward implementing their enhanced hazardous waste management program, prior to the Effective Date of this CAFO.

Hazardous Waste Determinations

21. Pursuant to 40 C.F.R. § 262.11, a person who generates a solid waste is required to determine if that waste is hazardous.

22. Based upon the terms of the Region 6 CAFOs, and without a nationwide investigation, or any admission of liability or guilt by Respondents, EPA has concluded that Respondents did not make sufficient hazardous waste determinations at all Whole Foods Market Stores as required by 40 C.F.R. § 262.11.

Universal Waste Management

23. Pursuant to 40 C.F.R. § 273.10, a small quantity handler of universal waste must comply with the applicable requirements at 40 C.F.R. §§ 273.10 through 273.20.

24. Based upon the terms of the Region 6 CAFOs, and without a nationwide investigation, or any admission of liability or guilt by Respondents, EPA has concluded that Respondents did not sufficiently comply with some of the standards set forth in 40 C.F.R. §§ 273.13 through 273.16 at all Whole Foods Market Stores.

VI. TERMS OF SETTLEMENT

25. Based on the foregoing, the Parties agree to the entry of this Consent Agreement on the terms set forth herein.

A. Compliance Provisions

26. Although a majority of Whole Foods Market Stores may qualify as CESQGs in any given month, pursuant to 40 C.F.R. § 261.5, the enhanced hazardous waste management program implemented by Respondents at Whole Foods Market Stores, as referenced in Paragraphs 27 through 29 and Appendices B through E of this CAFO, generally seeks to satisfy the hazardous waste generator requirements applicable to Small Quantity Generators (“SQGs”) and, therefore, goes above and beyond the minimum requirements applicable under the law.

27. As a condition of settlement, Respondents agree to implement the following measures as part of their enhanced hazardous waste management program:

- a. If applicable, Respondents shall obtain an EPA identification number for a Whole Foods Market Store pursuant to 40 C.F.R. § 262.12.
- b. Respondents must make a hazardous waste determination on all solid waste generated in its Stores pursuant to 40 C.F.R. § 262.11. As a means of complying with this requirement, Respondents have implemented, and will continue to implement Regional and/or State-specific hazardous waste determination guidance charts. These Regional and/or State-specific hazardous waste determination guidance charts are described and set forth in Appendix B of this CAFO. These charts are marked as and considered Confidential Business Information pursuant to 40 C.F.R. Part 2.
- c. To the extent Consumer Products become hazardous waste, Respondents have implemented, and will continue to implement a system to properly accumulate and store hazardous waste on-site, including, but not limited to, inspections and management of containers. This system, commonly referred to as the “bucket” or

“tote” system, accumulates and stores hazardous waste until it is picked up by a licensed hazardous waste hauler for proper off-site transport and disposal. Under this system, Respondents maintain records, such as manifests, to demonstrate proper off-site transport and disposal at their Stores. The “bucket” or “tote” system and the associated quick-reference materials for Retail Associates are further described and set forth in Appendix C of this CAFO. This system is marked as and considered Confidential Business Information pursuant to 40 C.F.R. Part 2.

- d. Respondents have implemented, and will continue to implement hazardous waste management trainings at its Stores for all Retail Associates. The hazardous waste management training materials for Retail Associates are further described in Appendix D of this CAFO. The training materials are marked as and considered Confidential Business Information pursuant to 40 C.F.R. Part 2.

28. Respondents shall continue their efforts to implement an electronic hazardous waste identification system as follows:

- a. Respondents will consult a third-party to review the Consumer Products at its Stores, and determine whether those Consumer Products, if discarded, would become hazardous waste pursuant to federal and state law and regulations.
- b. After the potentially hazardous items are identified, Whole Foods Market shall implement the electronic hazardous waste identification system to the maximum extent that Whole Foods Market determines it is operationally and technologically feasible. The third-party consultant or other qualified personnel will load the information into Respondents’ electronic hazardous waste identification system for use at Whole Foods Market Stores in identifying and classifying all solid waste

streams, which may include the use of hand-held scanners, in-store computer terminal, or other computer-based system(s).

29. In order to assist its Stores in implementing Respondents' enhanced hazardous waste management program described in Paragraph 27 of this CAFO, Respondents will develop and implement standard operating procedures ("SOPs") for use by Retail Associates at their Stores. These SOPs will be available and accessible to Retail Associates. These procedures are further described in Appendix E of this CAFO. The SOPs are marked as and considered Confidential Business Information pursuant to 40 C.F.R. Part 2.

30. No later than March 31, 2018, and annually thereafter until termination of this CAFO, Respondents must submit an annual report to EPA for the preceding calendar year that shall include: implementation progress of its electronic hazardous waste identification system described in Paragraph 28, including a description of the technology used for the system, and any other Global-Level revisions to Appendices B through E of this CAFO. These annual reports will be marked as and considered Confidential Business Information pursuant to 40 C.F.R. Part 2.

31. Respondents' third party audit procedures are further described in Appendix F of this CAFO. The Third Party Audit procedures are marked as and considered Confidential Business Information pursuant to 40 C.F.R. Part 2.

32. In all instances in which this CAFO requires written submission to EPA, each submission must be signed by a responsible corporate officer of Whole Foods Market and include the following certification:

I certify under penalty of law that I have personally examined and am familiar with the information submitted in this document and all documents submitted herewith; and that, to the best of my knowledge and belief, the submitted information is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine or imprisonment.

B. Civil Penalty

33. Respondents agree to pay a civil penalty in the sum of \$500,000.00 within thirty (30) days of the Effective Date of this CAFO.

34. Respondents must pay the assessed civil penalty by either cashier's check, certified check, or wire transfer, made payable to: **Treasurer, United States of America**. Payment must be remitted in one of three (3) ways: regular U.S. Postal mail (including certified mail), overnight mail, or wire transfer. For regular U.S. Postal mail, U.S. Postal Service certified mail, or U.S. Postal Service express mail, the check should be remitted to:

United States Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, Missouri 63197-9000

For overnight mail (non-U.S. Postal Service, e.g. Fed Ex), the check should be remitted to:

U.S. Bank
Government Lockbox 979077
U.S. EPA Fines and Penalties
1005 Convention Plaza
SL-MO-C2-GL
St. Louis, Missouri 63101
Phone No. (314) 425-1818

For wire transfer, the payment should be remitted to:

Federal Reserve Bank of New York
ABA Routing Number: 021030004
Account Number: 68010727
SWIFT address: FRNYUS33
33 Liberty Street
New York, NY 10045
Field Tag 4200 of the Fedwire message should read: "D 68010727 Environmental Protection Agency"

The case name and document number (In the Matter of Whole Foods Market Group, Inc., et. al., Docket No. RCRA-HQ-2017-0001) must be clearly documented on or within Respondents' chosen method of payment to ensure proper credit.

35. Respondents shall submit a copy of the payment to the following addresses:

U.S. Environmental Protection Agency
Clerk of the Board
Environmental Appeals Board
1200 Pennsylvania Avenue, N.W. (MC 1103M)
Washington, D.C. 20460-0001

Laura Welles, Attorney-Advisor
Waste and Chemical Enforcement Division
Office of Civil Enforcement
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W. (MC 2249A)
Washington, D.C. 20460

36. Penalties paid pursuant to this CAFO are not deductible for federal purposes under 26 U.S.C. § 162(f).

37. Pursuant to 31 U.S.C. § 3717 and 40 C.F.R. § 13.11, unless otherwise prohibited by law, EPA will assess interest and late payment penalties on debts owed to the United States and a charge to cover the costs of processing and handling the delinquent claim. Interest on the civil penalty assessed in this CAFO will begin to accrue thirty (30) days after the Effective Date of the CAFO and will be recovered by EPA on any amount of the civil penalty that is not paid by the respective due date. In accordance with 31 U.S.C. § 3717 and 40 C.F.R. § 13.11, Respondents must pay the following amounts on any amount overdue:

- a. Interest. Any unpaid portion of a civil penalty must bear interest at the rate established by the Secretary of the Treasury pursuant to 31 U.S.C. § 3717(a)(1). Interest will therefore begin to accrue on a civil penalty or stipulated penalty if it is

not paid by the last date required. Interest will be assessed at the rate of the United States Treasury tax and loan rate in accordance with 40 C.F.R. § 13.11(a).

- b. Monthly Handling Charge. Respondents must pay a late payment handling charge of fifteen (\$15.00) on any late payment, with an additional charge of \$15.00 for each subsequent thirty (30) day period over which an unpaid balance remains.
- c. Non-payment Penalty. On any portion of a civil penalty more than ninety (90) days past due, Respondents must pay a non-payment penalty charge of six percent (6%) per annum, which will accrue from the date the penalty payment became due and is not paid. 40 C.F.R. § 13.11(c). This non-payment penalty charge is in addition to charges which accrue or may accrue under subparagraphs (a) and (b).

C. Supplemental Environmental Project

38. Respondents shall implement the Supplemental Environmental Project in Appendix G of this CAFO.

D. Delay in Performance/Stipulated Penalties

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39. Upon written notice of an alleged violation of the requirements set forth in Section VI.C. (Supplemental Environmental Project) of this CAFO or of the applicable federal hazardous waste regulations set forth in 40 Code of Federal Regulations Parts 260-279, Respondents shall have nine (9) days to cure the alleged violation. In the event Respondents fail to cure the alleged violation within the nine (9) day time period, Respondents shall be liable for stipulated penalties to the EPA, as specified below.

Period of Failure to Comply	Penalty Per Violation Per Day
10th through 20 th day	\$100.00
21st through 30 th day	\$250.00
Greater than 30 days	\$500.00

40. Payment of stipulated penalties will not alter in any way Whole Foods Market's obligation to comply with the requirements of this CAFO.

VII. DISPUTE RESOLUTION

41. The dispute resolution procedures set forth in this Section shall be the exclusive mechanism to resolve any disputes arising under or with respect to this CAFO.

42. The Parties agree to meet and confer informally and in good faith to resolve all disputes arising from this CAFO. If Respondents disagree, in whole or in part, with any decision by EPA regarding this CAFO, Respondents agree to notify EPA, through the Chief of the Waste Enforcement Branch, and the Parties agree to use best efforts to informally and in good faith resolve their dispute. If EPA disagrees, in whole or in part, with any action or inaction taken by a Respondent under this CAFO, EPA agrees to notify Respondent, and the Parties agree to use their best efforts to informally and in good faith resolve their dispute within thirty (30) days. If the Parties are unable to resolve their dispute informally, and the Parties agree they have reached an impasse, they shall submit the dispute to a neutral third party mediator selected and agreed upon by the Parties and the Parties shall participate in non-binding mediation consistent with 40 C.F.R. 22.18(d).

VIII. OTHER MATTERS

43. Nothing in this CAFO shall relieve Respondents of the duty to comply with all applicable provisions of RCRA and any other federal, state, or local laws and regulations.

44. Notwithstanding any other provision of this CAFO, nothing in this CAFO shall be construed to limit the authority of the EPA to take any action against Respondents to address conditions that may present an imminent and substantial endangerment to human health or the environment. Complainant reserves the right to take enforcement action against Respondents for any future violations of RCRA and the implementing regulations and to enforce the terms and conditions of this CAFO.

45. EPA and Respondents agree that Respondents' have no obligations under this Consent Agreement should it be rejected by the Environmental Appeals Board (the "EAB"); provided, however, that in the event that the EAB expresses any objections to, or its intent to reject this Consent Agreement, the Parties agree that they shall exercise their mutual best efforts to address and resolve the EAB's objections. The Parties shall have the right to withdraw from this CAFO in the event they are unable to reach agreement on the EAB's proposed changes or objections.

46. This CAFO may be amended or modified only by written agreement executed by both the EPA and each Respondent.

47. The terms of this CAFO ~~binds~~bind the Parties and their successors and assigns.

48. The undersigned representative of each party to this CAFO certifies that each is duly authorized by the party whom he or she represents to enter into these terms and conditions and to legally bind that party to it.

49. Unless otherwise specified herein, whenever notice is required to be given, whenever a report or other document is required to be forwarded by one party to another, or whenever a submission or demonstration is required to be made, it must be directed to the individuals specified below at the addresses given, unless these individuals or their successors give notice in writing to the other parties that another individual has been designated to receive the communication:

Complainant:

Chief, Waste Enforcement Branch
Waste and Chemical Enforcement Division
Office of Civil Enforcement
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W. (MC 2249A)
Washington, D.C. 20460

Respondents:

Whole Foods Market Central Office
Attn: John H. Hempfling II
550 Bowie Street
Austin, TX 78703

With copy to:

King Williams LLP
Attn: Jennifer Hartman King
520 Capitol Mall, Ste 750
Sacramento, CA 95814

50. At such time as the Respondents believe they have completed all of the requirements of this CAFO, Respondents shall so certify in writing and in accordance with the certification language set forth in Paragraph 32. Within sixty (60) days of EPA's receipt of Respondents' certification, EPA shall notify Respondents in writing whether EPA agrees that Respondents have completed all requirements, or if EPA does not agree it shall identify the basis for its position. If EPA does not agree with Whole Foods Market's certification, Whole Foods

Market shall address the matters identified in EPA's objection, and may thereafter recertify completion of the CAFO. Upon notification by EPA that it agrees with Respondents' certification, or if EPA does not respond within sixty (60) days, Respondents' liability for federal civil penalties only is resolved for the violations alleged in Section V (EPA Allegations and Determinations) of this CAFO. This CAFO does not affect the right of EPA or the United States from taking action as provided by 40 C.F.R. 22.18(c).

51. The headings in this CAFO are for convenience of reference only and shall not affect the interpretation of this CAFO.

52. The Parties to this CAFO shall bear their own costs and attorneys' fees in this matter.

53. This CAFO and the attached proposed Final Order shall become effective upon execution of the Final Order by EAB and filing with the Clerk of the EAB ("Effective Date"). 40 C.F.R. §§ 22.18(b)(2) and 22.31(b).

[SIGNATURES BEGIN ON NEXT PAGE]

AGREED AND CONSENTED TO:

FOR COMPLAINANT:

Date: _____

Gregory Sullivan, Director
Waste and Chemical Enforcement Division
Office of Civil Enforcement
Office of Enforcement and Compliance Assurance
United States Environmental Protection Agency

Date: _____

Laura Welles, Attorney-Advisor
Waste and Chemical Enforcement Division
Office of Civil Enforcement
Office of Enforcement and Compliance Assurance
United States Environmental Protection Agency

[SIGNATURES CONTINUE ON NEXT PAGE]

FOR RESPONDENT WHOLE FOODS MARKET GROUP, INC.:

Date: _____

FOR RESPONDENT WHOLE FOODS MARKET CALIFORNIA, INC.:

Date: _____

FOR RESPONDENT MRS. GOOCH'S FOOD MARKETS, INC.:

Date: _____

FOR RESPONDENT WHOLE FOODS MARKET PACIFIC NORTHWEST, INC.:

Date: _____

FOR RESPONDENT WHOLE FOODS MARKET ROCKY MOUNTAIN/SOUTHWEST, L.P.:

Date: _____

FOR RESPONDENT WFM NORTHERN NEVADA, INC.:

Date: _____

FOR RESPONDENT WFM SOUTHERN NEVADA, INC.:

Date: _____

[SIGNATURES CONTINUE ON NEXT PAGE]

FOR RESPONDENT WFM HAWAII, LLC:

Date: _____

FOR RESPONDENT WFM KANSAS, LLC:

Date: _____

FOR RESPONDENT WFM-WO, INC.:

Date: _____

FOR RESPONDENT NATURE'S HEARTLAND, INC.:

Date: _____

FOR RESPONDENT WFM NEBRASKA, LLC:

Date: _____

FOR RESPONDENT WHOLE FOODS MARKET LUSHER COURT FRISCO CO, LLC:

Date: _____

**BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.**

IN THE MATTER OF:	)	EPA Docket No.
	)	RCRA-HQ-2017-0001
)	
)	
Whole Foods Market Group, Inc.,	)	Proceeding Under Section 3008(a) of the
Whole Foods Market California, Inc.,	)	Resource Conservation and Recovery Act,
Mrs. Gooch's Natural Food Markets, Inc.,	)	42 U.S.C. § 6928(a)
Whole Foods Market Pacific Northwest, Inc.,)	
Whole Foods Market Rocky Mountain/ Southwest, L.P.,)	
WFM Northern Nevada, Inc.,)	
WFM Southern Nevada, Inc.,)	
WFM Hawaii, LLC,)	
WFM Kansas, LLC,)	
WFM-WO, Inc.,)	
Nature's Heartland, Inc.,)	
WFM Nebraska, LLC, and)	
Whole Foods Market Lusher Court Frisco CO, LLC)	
)	
RESPONDENTS.)	

CONSENT AGREEMENT AND FINAL ORDER

I. PRELIMINARY STATEMENT

1. Complainant, the United States Environmental Protection Agency ("EPA"), and Respondents, Whole Foods Market Group, Inc., a Delaware corporation, Whole Foods Market California, Inc., a California corporation, Mrs. Gooch's Natural Food Markets, Inc., a California corporation, Whole Foods Market Pacific Northwest, Inc., a Delaware corporation, Whole Foods Market Rocky Mountain/Southwest, L.P., a Texas limited partnership, WFM Northern Nevada, Inc., a Delaware corporation, WFM Southern Nevada, Inc., a Delaware corporation, WFM Hawaii, LLC, a Hawaii limited liability company, WFM Kansas, LLC, a Kansas limited liability company,

WFM-WO, Inc., a Delaware corporation, Nature's Heartland, Inc., a Massachusetts corporation, WFM Nebraska, LLC, a Delaware limited liability company, and Whole Foods Market Lusher Court Frisco CO, LLC a Delaware limited liability company (collectively the "Respondents" or "Whole Foods Market"), hereby enter into this Consent Agreement ("Agreement" or "Consent Agreement"), and the attached proposed Final Order (collectively, the "CAFO") before taking testimony and without adjudication of any issues of fact or law herein.

2. Complainant and Respondents, having conferred for the purposes of settlement pursuant to the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Consolidated Rules"), 40 C.F.R. § 22.18, and expressing a mutual desire to enter into a global agreement covering the Whole Foods Market Stores identified in Appendix A of this CAFO, which is attached hereto and incorporated by reference herein, have agreed to the execution of this CAFO. Appendix A is marked as and considered Confidential Business Information pursuant to 40 C.F.R. Part 2. Respondents hereby agree to comply with the terms of this CAFO.

3. For the purposes of this CAFO and in accordance with the specific requirements for settlement set forth in 40 C.F.R. § 22.18(b)(2):

- a. Respondents admit the jurisdictional allegations set forth in this CAFO;
- b. Respondents neither admit nor deny the factual allegations and legal conclusions contained in this CAFO;
- c. Respondents consent to the assessment and payment of the civil penalty in the amount and by the method set forth in this CAFO;
- d. Respondents consent to the terms and conditions specified in the compliance provisions set forth in this CAFO; and

e. Respondents consent to perform the Supplemental Environmental Project set forth in this CAFO.

4. The Respondents waive any right they may have to contest the allegations set forth in this CAFO and any right to appeal the proposed Final Order set forth herein. 40 C.F.R. § 22.18(b)(2). Respondents do not waive any claims or defenses Respondents have to the interpretation of this CAFO or its terms.

II. THE PARTIES

5. Gregory Sullivan, Director, Waste and Chemical Enforcement Division, Office of Civil Enforcement, Office of Enforcement and Compliance Assurance, is authorized, by lawful delegation, to initiate and settle civil administrative actions brought pursuant to Section 3008(a) of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976 and the Hazardous and Solid Waste Amendments ("HSWA") of 1984 (collectively, "RCRA"), 42 U.S.C. § 6928(a).

6. Respondents own and operate the Whole Foods Market Stores identified in Appendix A of this CAFO.

III. JURISDICTION

7. The parties agree to the commencement and conclusion of this matter through the issuance of this CAFO, which is authorized pursuant to Section 3008(a) of RCRA, 42 U.S.C. § 6928(a) and the Consolidated Rules, 40 C.F.R. §§ 22.13(b) and 22.18(b)(2) and (3).

8. RCRA Subtitle C (42 U.S.C. § 6921 *et seq.*) and its implementing regulations, set forth in 40 C.F.R. Parts 260-279, comprise EPA's RCRA hazardous waste program. Section 3006(b) of RCRA, 42 U.S.C. § 6926(b), allows the Administrator to authorize a state to administer its own hazardous waste program in lieu of the federal program when the Administrator finds that

the state program meets certain conditions.¹ A violation of a state provision authorized pursuant to Section 3006 of RCRA, 42 U.S.C. § 6926, constitutes a violation of a requirement of Subtitle C, and is subject to the assessment of civil penalties and issuance of compliance orders by EPA as provided by Section 3008(a) of RCRA, 42 U.S.C. § 6928(a).

9. Pursuant to RCRA Section 3008(a)(2), 42 U.S.C. § 6928(a)(2), notice of the commencement of this action has been given to all Affected States and Territories.

IV. DEFINITIONS

10. Unless otherwise expressly provided herein, terms used in the CAFO that are defined in RCRA, 42 U.S.C. §§ 6901 *et seq.*, or in regulations promulgated under RCRA, 40 C.F.R. Parts 260-279, or in a state's authorized hazardous waste program, shall have the same meaning in this CAFO as such term has under RCRA or under federal or applicable authorized state regulations. In the case of a conflict between federal and state definitions, federal definitions shall control. Whenever terms defined below are used in this CAFO, such definitions shall apply:

- a. "Affected State and Territory" means a state or territory of the United States in which a Whole Foods Market Store is located as identified in Appendix A of this CAFO. Oklahoma, Texas, Louisiana, New Mexico, and Arkansas are not Affected States for purposes of this CAFO.
- b. "Business Day" means any day other than Saturday, Sunday, or a federal or legal holiday.

¹ Each of the Affected States and Territories described herein, with the exception of Iowa, have received authorization to administer the base RCRA hazardous waste program (requirements imposed by the Solid Waste Disposal Act prior to the Hazardous and Solid Waste Amendments of 1984) in lieu of the federal government's program. Not all the Affected States and Territories described herein are authorized to administer the Universal Waste regulations at 40 C.F.R. Part 273. Thus, where applicable, citations to the Code of Federal Regulations is a citation to the corresponding regulations contained within the Affected State's or Territory's authorized RCRA hazardous waste program.

- c. "Conditionally Exempt Small Quantity Generator" means a facility that generates 100 kg of hazardous waste or less in a calendar month.
- d. "Confidential Business Information" or "CBI" shall have the same definition as in 40 C.F.R. §§ 2.201-2.311.
- e. "Consent Agreement and Final Order" or "CAFO" shall mean this Consent Agreement and attached Final Order and all Appendices hereto. In the event of conflict between this Consent Agreement and any Appendix, this Consent Agreement shall control.
- f. "Consumer Products" shall mean any merchandise sold by Respondents at Whole Foods Market Stores, which if discarded, may have to be managed as RCRA hazardous waste.
- g. "Day" means a calendar day unless expressly stated to be a business day. In computing any period of time under this CAFO, where the last day would fall on a Saturday, Sunday, or federal, legal or Affected State or Territory holiday, the period shall run until the close of business of the next business day.
- h. "Effective Date" is defined in Section VIII of this CAFO.
- i. "EPA" means the United States Environmental Protection Agency.
- j. "Global-Level" shall mean any change to this CAFO's Appendices B through E instituted and/or approved by Whole Foods Market's Global Legal Team.
- k. "Large Quantity Generator" means a facility that generates 1000 kg or more of hazardous waste in a calendar month.
- l. "Notify" and "Submit" and other terms signifying an obligation to transmit or communicate documents and information mean to deliver in person, send via electronic mail, deposit in the U.S. mail or dispatch by express courier so that such transmission

or communication arrives to the designated recipient by close of business on the day required by this CAFO. If that required day is not a Business Day then the delivery, deposit, or dispatch shall be made by the close of business the next Business Day.

- m. "Paragraph" shall mean a portion of this CAFO identified by an arabic numeral and, in some cases, an associated lower case letter.
- n. "Parties" shall mean Complainant and all Respondents.
- o. "RCRA" means the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 *et seq.*
- p. "Respondents" mean the entities described in Paragraphs 1 and 6 of this CAFO.
- q. "Retail Associate" means a Whole Foods Market Store employee, including store leadership and team members.
- r. "Section" shall mean a portion of this CAFO identified by a roman numeral.
- s. "Small Quantity Generator" means a facility that generates more than 100 kg and less than 1000 kg of hazardous waste in a calendar month.
- t. "Small Quantity Handler of Universal Waste" means a generator of universal waste that does not accumulate 5,000 kilograms or more of universal waste (e.g., batteries, mercury-containing equipment, or fluorescent lamps, calculated collectively) at any time. 40 C.F.R. § 273.9.
- u. "Solid Waste" means any discarded material that is not excluded under 40 C.F.R. § 261.4(a) or that is not excluded by variance granted under §§ 260.30 and 260.31.
- v. "Stores," "Facilities," or "Whole Foods Market Stores" mean Whole Foods Market retail grocery stores, or any future Whole Foods Market retail grocery store (including

“365 by Whole Foods Market” stores), located in the United States (including Puerto Rico and other U.S. territories).

w. “United States” means the United States of America, and all of its departments, agencies, and instrumentalities.

x. “Universal Waste” means certain hazardous wastes that are subject to the universal waste requirements of 40 C.F.R. Part 273, including fluorescent lamps. 40 C.F.R. §§ 273.1 and 273.9.

V. EPA ALLEGATIONS AND DETERMINATIONS

11. Each Respondent is a “person” as defined in Section 1004(15) of RCRA, 42 U.S.C. § 6903(15) and 40 C.F.R. § 260.10.

12. Respondents own and operate the Stores identified in Appendix A of this CAFO. The stores identified in Appendix A are “facilities” within the meaning of 40 C.F.R. § 260.10.

13. Respondents sell Consumer Products, some of which may become “solid waste” when they are returned, expired, spill or are in a condition such that they cannot be used for their intended purpose.

14. Some of the Consumer Products that become solid waste may be considered hazardous waste under federal or state law by having the characteristic of ignitability (D001), corrosivity (D002), or toxicity (D007, D010, D009, and D011).

15. Most, if not all, Whole Foods Market Stores generate 100 kilograms (“kg”) of hazardous waste or less in any given month, and therefore, are considered Conditionally Exempt Small Quantity Generators (“CESQGs”) pursuant to 40 C.F.R. § 261.5. As CESQGs, the Stores are exempt from regulation under the hazardous waste generator requirements at 40 C.F.R. Part

262 and the notification requirements of RCRA Section 3010 in any given month, provided that the requirements in 40 C.F.R. § 261.5 are met.

16. Between August 2014 and August 2015, EPA Region 6 conducted an investigation of Whole Food Company, Inc. and Respondent Whole Foods Market Rocky Mountain/Southwest, L.P.'s Stores located in Texas, Oklahoma, New Mexico, Louisiana and Arkansas (the "Investigation"). From the Investigation, EPA Region 6 concluded that a sufficient hazardous waste determination was not consistently made on all solid waste streams as required by 40 C.F.R. § 262.11(c), and one or more of the universal waste requirements set forth in 40 C.F.R. §§ 273.13 through 273.16 were not consistently complied with.

17. As a result of the Investigation, EPA Region 6, Whole Food Company, Inc. and Respondent Whole Foods Market Rocky Mountain/Southwest, L.P. entered into consent agreements and final orders for the Stores located within EPA Region 6's jurisdiction (the "Region 6 CAFOs").

18. Following the Investigation and Region 6 CAFOs, Respondents voluntarily contacted EPA and the Parties engaged in discussions that led to them agreeing to enter into a similar settlement agreement for Stores located in the Affected States and Territories, other than those covered by the Region 6 CAFOs. As part of the settlement discussions, Respondents informed EPA that there were no spills, leaks or releases at or from Respondents' Facilities, nor has EPA identified any such spills, leaks or releases.

19. The Parties' discussions have resulted in the agreement contained herein, which includes implementation of an enhanced hazardous waste management system in all of Respondents' Stores. This enhanced hazardous waste management system is designed to ensure the proper management of hazardous wastes at all Whole Foods Market Stores, and in many

respects goes beyond the minimum requirements necessary for compliance with the applicable federal and state hazardous waste laws and regulations. This program is more fully described in Paragraphs 27 through 29 of this CAFO and Appendices B through E.

20. Respondents have already taken steps toward implementing their enhanced hazardous waste management program, prior to the Effective Date of this CAFO.

Hazardous Waste Determinations

21. Pursuant to 40 C.F.R. § 262.11, a person who generates a solid waste is required to determine if that waste is hazardous.

22. Based upon the terms of the Region 6 CAFOs, and without a nationwide investigation, or any admission of liability or guilt by Respondents, EPA has concluded that Respondents did not make sufficient hazardous waste determinations at all Whole Foods Market Stores as required by 40 C.F.R. § 262.11.

Universal Waste Management

23. Pursuant to 40 C.F.R. § 273.10, a small quantity handler of universal waste must comply with the applicable requirements at 40 C.F.R. §§ 273.10 through 273.20.

24. Based upon the terms of the Region 6 CAFOs, and without a nationwide investigation, or any admission of liability or guilt by Respondents, EPA has concluded that Respondents did not sufficiently comply with some of the standards set forth in 40 C.F.R. §§ 273.13 through 273.16 at all Whole Foods Market Stores.

VI. TERMS OF SETTLEMENT

25. Based on the foregoing, the Parties agree to the entry of this Consent Agreement on the terms set forth herein.

A. Compliance Provisions

26. Although a majority of Whole Foods Market Stores may qualify as CESQGs in any given month, pursuant to 40 C.F.R. § 261.5, the enhanced hazardous waste management program implemented by Respondents at Whole Foods Market Stores, as referenced in Paragraphs 27 through 29 and Appendices B through E of this CAFO, generally seeks to satisfy the hazardous waste generator requirements applicable to Small Quantity Generators ("SQGs") and, therefore, goes above and beyond the minimum requirements applicable under the law.

27. As a condition of settlement, Respondents agree to implement the following measures as part of their enhanced hazardous waste management program:

- a. If applicable, Respondents shall obtain an EPA identification number for a Whole Foods Market Store pursuant to 40 C.F.R. § 262.12.
- b. Respondents must make a hazardous waste determination on all solid waste generated in its Stores pursuant to 40 C.F.R. § 262.11. As a means of complying with this requirement, Respondents have implemented, and will continue to implement Regional and/or State-specific hazardous waste determination guidance charts. These Regional and/or State-specific hazardous waste determination guidance charts are described and set forth in Appendix B of this CAFO. These charts are marked as and considered Confidential Business Information pursuant to 40 C.F.R. Part 2.
- c. To the extent Consumer Products become hazardous waste, Respondents have implemented, and will continue to implement a system to properly accumulate and store hazardous waste on-site, including, but not limited to, inspections and management of containers. This system, commonly referred to as the "bucket" or

“tote” system, accumulates and stores hazardous waste until it is picked up by a licensed hazardous waste hauler for proper off-site transport and disposal. Under this system, Respondents maintain records, such as manifests, to demonstrate proper off-site transport and disposal at their Stores. The “bucket” or “tote” system and the associated quick-reference materials for Retail Associates are further described and set forth in Appendix C of this CAFO. This system is marked as and considered Confidential Business Information pursuant to 40 C.F.R. Part 2.

- d. Respondents have implemented, and will continue to implement hazardous waste management trainings at its Stores for all Retail Associates. The hazardous waste management training materials for Retail Associates are further described in Appendix D of this CAFO. The training materials are marked as and considered Confidential Business Information pursuant to 40 C.F.R. Part 2.

28. Respondents shall continue their efforts to implement an electronic hazardous waste identification system as follows:

- a. Respondents will consult a third-party to review the Consumer Products at its Stores, and determine whether those Consumer Products, if discarded, would become hazardous waste pursuant to federal and state law and regulations.
- b. After the potentially hazardous items are identified, Whole Foods Market shall implement the electronic hazardous waste identification system to the maximum extent that Whole Foods Market determines it is operationally and technologically feasible. The third-party consultant or other qualified personnel will load the information into Respondents’ electronic hazardous waste identification system for use at Whole Foods Market Stores in identifying and classifying all solid waste

streams, which may include the use of hand-held scanners, in-store computer terminal, or other computer-based system(s).

29. In order to assist its Stores in implementing Respondents' enhanced hazardous waste management program described in Paragraph 27 of this CAFO, Respondents will develop and implement standard operating procedures ("SOPs") for use by Retail Associates at their Stores. These SOPs will be available and accessible to Retail Associates. These procedures are further described in Appendix E of this CAFO. The SOPs are marked as and considered Confidential Business Information pursuant to 40 C.F.R. Part 2.

30. No later than March 31, 2018, and annually thereafter until termination of this CAFO, Respondents must submit an annual report to EPA for the preceding calendar year that shall include: implementation progress of its electronic hazardous waste identification system described in Paragraph 28, including a description of the technology used for the system, and any other Global-Level revisions to Appendices B through E of this CAFO. These annual reports will be marked as and considered Confidential Business Information pursuant to 40 C.F.R. Part 2.

31. Respondents' third party audit procedures are further described in Appendix F of this CAFO. The Third Party Audit procedures are marked as and considered Confidential Business Information pursuant to 40 C.F.R. Part 2.

32. In all instances in which this CAFO requires written submission to EPA, each submission must be signed by a responsible corporate officer of Whole Foods Market and include the following certification:

I certify under penalty of law that I have personally examined and am familiar with the information submitted in this document and all documents submitted herewith; and that, to the best of my knowledge and belief, the submitted information is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine or imprisonment.

B. Civil Penalty

33. Respondents agree to pay a civil penalty in the sum of \$500,000.00 within thirty (30) days of the Effective Date of this CAFO.

34. Respondents must pay the assessed civil penalty by either cashier's check, certified check, or wire transfer, made payable to: **Treasurer, United States of America**. Payment must be remitted in one of three (3) ways: regular U.S. Postal mail (including certified mail), overnight mail, or wire transfer. For regular U.S. Postal mail, U.S. Postal Service certified mail, or U.S. Postal Service express mail, the check should be remitted to:

United States Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, Missouri 63197-9000

For overnight mail (non-U.S. Postal Service, e.g. Fed Ex), the check should be remitted to:

U.S. Bank
Government Lockbox 979077
U.S. EPA Fines and Penalties
1005 Convention Plaza
SL-MO-C2-GL
St. Louis, Missouri 63101
Phone No. (314) 425-1818

For wire transfer, the payment should be remitted to:

Federal Reserve Bank of New York
ABA Routing Number: 021030004
Account Number: 68010727
SWIFT address: FRNYUS33
33 Liberty Street
New York, NY 10045
Field Tag 4200 of the Fedwire message should read: "D 68010727 Environmental Protection Agency"

The case name and document number (In the Matter of Whole Foods Market Group, Inc., et. al., Docket No. RCRA-HQ-2017-0001) must be clearly documented on or within Respondents' chosen method of payment to ensure proper credit.

35. Respondents shall submit a copy of the payment to the following addresses:

U.S. Environmental Protection Agency
Clerk of the Board
Environmental Appeals Board
1200 Pennsylvania Avenue, N.W. (MC 1103M)
Washington, D.C. 20460-0001

Laura Welles, Attorney-Advisor
Waste and Chemical Enforcement Division
Office of Civil Enforcement
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W. (MC 2249A)
Washington, D.C. 20460

36. Penalties paid pursuant to this CAFO are not deductible for federal purposes under 26 U.S.C. § 162(f).

37. Pursuant to 31 U.S.C. § 3717 and 40 C.F.R. § 13.11, unless otherwise prohibited by law, EPA will assess interest and late payment penalties on debts owed to the United States and a charge to cover the costs of processing and handling the delinquent claim. Interest on the civil penalty assessed in this CAFO will begin to accrue thirty (30) days after the Effective Date of the CAFO and will be recovered by EPA on any amount of the civil penalty that is not paid by the respective due date. In accordance with 31 U.S.C. § 3717 and 40 C.F.R. § 13.11, Respondents must pay the following amounts on any amount overdue:

- a. Interest. Any unpaid portion of a civil penalty must bear interest at the rate established by the Secretary of the Treasury pursuant to 31 U.S.C. § 3717(a)(1). Interest will therefore begin to accrue on a civil penalty or stipulated penalty if it is

not paid by the last date required. Interest will be assessed at the rate of the United States Treasury tax and loan rate in accordance with 40 C.F.R. § 13.11(a).

- b. Monthly Handling Charge. Respondents must pay a late payment handling charge of fifteen (\$15.00) on any late payment, with an additional charge of \$15.00 for each subsequent thirty (30) day period over which an unpaid balance remains.
- c. Non-payment Penalty. On any portion of a civil penalty more than ninety (90) days past due, Respondents must pay a non-payment penalty charge of six percent (6%) per annum, which will accrue from the date the penalty payment became due and is not paid. 40 C.F.R. § 13.11(c). This non-payment penalty charge is in addition to charges which accrue or may accrue under subparagraphs (a) and (b).

C. Supplemental Environmental Project

38. Respondents shall implement the Supplemental Environmental Project in Appendix G of this CAFO.

D. Delay in Performance/Stipulated Penalties

39. Upon written notice of an alleged violation of the requirements set forth in Section VI.C. (Supplemental Environmental Project) of this CAFO or of the applicable federal hazardous waste regulations set forth in 40 Code of Federal Regulations Parts 260-279, Respondents shall have nine (9) days to cure the alleged violation. In the event Respondents fail to cure the alleged violation within the nine (9) day time period, Respondents shall be liable for stipulated penalties to the EPA, as specified below.

Period of Failure to Comply	Penalty Per Violation Per Day
10th through 20 th day	\$100.00
21st through 30 th day	\$250.00
Greater than 30 days	\$500.00

40. Payment of stipulated penalties will not alter in any way Whole Foods Market's obligation to comply with the requirements of this CAFO.

VII. DISPUTE RESOLUTION

41. The dispute resolution procedures set forth in this Section shall be the exclusive mechanism to resolve any disputes arising under or with respect to this CAFO.

42. The Parties agree to meet and confer informally and in good faith to resolve all disputes arising from this CAFO. If Respondents disagree, in whole or in part, with any decision by EPA regarding this CAFO, Respondents agree to notify EPA, through the Chief of the Waste Enforcement Branch, and the Parties agree to use best efforts to informally and in good faith resolve their dispute. If EPA disagrees, in whole or in part, with any action or inaction taken by a Respondent under this CAFO, EPA agrees to notify Respondent, and the Parties agree to use their best efforts to informally and in good faith resolve their dispute within thirty (30) days. If the Parties are unable to resolve their dispute informally, and the Parties agree they have reached an impasse, they shall submit the dispute to a neutral third party mediator selected and agreed upon by the Parties and the Parties shall participate in non-binding mediation consistent with 40 C.F.R. 22.18(d).

VIII. OTHER MATTERS

43. Nothing in this CAFO shall relieve Respondents of the duty to comply with all applicable provisions of RCRA and any other federal, state, or local laws and regulations.

44. Notwithstanding any other provision of this CAFO, nothing in this CAFO shall be construed to limit the authority of the EPA to take any action against Respondents to address conditions that may present an imminent and substantial endangerment to human health or the environment. Complainant reserves the right to take enforcement action against Respondents for any future violations of RCRA and the implementing regulations and to enforce the terms and conditions of this CAFO.

45. EPA and Respondents agree that Respondents' have no obligations under this Consent Agreement should it be rejected by the Environmental Appeals Board (the "EAB"); provided, however, that in the event that the EAB expresses any objections to, or its intent to reject this Consent Agreement, the Parties agree that they shall exercise their mutual best efforts to address and resolve the EAB's objections. The Parties shall have the right to withdraw from this CAFO in the event they are unable to reach agreement on the EAB's proposed changes or objections.

46. This CAFO may be amended or modified only by written agreement executed by both the EPA and each Respondent.

47. The terms of this CAFO bind the Parties and their successors and assigns.

48. The undersigned representative of each party to this CAFO certifies that each is duly authorized by the party whom he or she represents to enter into these terms and conditions and to legally bind that party to it.

49. Unless otherwise specified herein, whenever notice is required to be given, whenever a report or other document is required to be forwarded by one party to another, or whenever a submission or demonstration is required to be made, it must be directed to the individuals specified below at the addresses given, unless these individuals or their successors give notice in writing to the other parties that another individual has been designated to receive the communication:

Complainant:

Chief, Waste Enforcement Branch
Waste and Chemical Enforcement Division
Office of Civil Enforcement
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W. (MC 2249A)
Washington, D.C. 20460

Respondents:

Whole Foods Market Central Office
Attn: John H. Hempfling II
550 Bowie Street
Austin, TX 78703

With copy to:

King Williams LLP
Attn: Jennifer Hartman King
520 Capitol Mall, Ste 750
Sacramento, CA 95814

50. At such time as the Respondents believe they have completed all of the requirements of this CAFO, Respondents shall so certify in writing and in accordance with the certification language set forth in Paragraph 32. Within sixty (60) days of EPA's receipt of Respondents' certification, EPA shall notify Respondents in writing whether EPA agrees that Respondents have completed all requirements, or if EPA does not agree it shall identify the basis for its position. If EPA does not agree with Whole Foods Market's certification, Whole Foods

Market shall address the matters identified in EPA's objection, and may thereafter recertify completion of the CAFO. Upon notification by EPA that it agrees with Respondents' certification, or if EPA does not respond within sixty (60) days, Respondents' liability for federal civil penalties only is resolved for the violations alleged in Section V (EPA Allegations and Determinations) of this CAFO. This CAFO does not affect the right of EPA or the United States from taking action as provided by 40 C.F.R. 22.18(c).

51. The headings in this CAFO are for convenience of reference only and shall not affect the interpretation of this CAFO.

52. The Parties to this CAFO shall bear their own costs and attorneys' fees in this matter.

53. This CAFO and the attached proposed Final Order shall become effective upon execution of the Final Order by EAB and filing with the Clerk of the EAB ("Effective Date"). 40 C.F.R. §§ 22.18(b)(2) and 22.31(b).

[SIGNATURES BEGIN ON NEXT PAGE]

AGREED AND CONSENTED TO:

FOR COMPLAINANT:

Date: _____

Gregory Sullivan, Director
Waste and Chemical Enforcement Division
Office of Civil Enforcement
Office of Enforcement and Compliance Assurance
United States Environmental Protection Agency

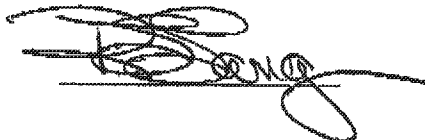
Date: _____

Laura Welles, Attorney-Advisor
Waste and Chemical Enforcement Division
Office of Civil Enforcement
Office of Enforcement and Compliance Assurance
United States Environmental Protection Agency

[SIGNATURES CONTINUE ON NEXT PAGE]

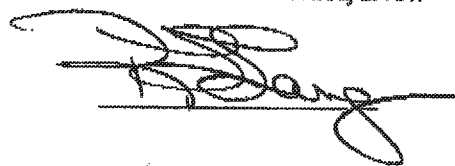
FOR RESPONDENT WHOLE FOODS MARKET GROUP, INC.:

Date: 1/18/17



FOR RESPONDENT WHOLE FOODS MARKET CALIFORNIA, INC.:

Date: 1/18/17



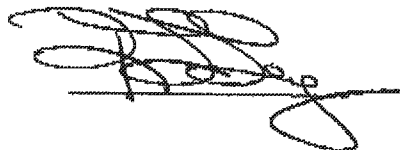
FOR RESPONDENT MRS. GOOCH'S FOOD MARKETS, INC.:

Date: 1/18/17




FOR RESPONDENT WHOLE FOODS MARKET PACIFIC NORTHWEST, INC.:

Date: 1/18/17



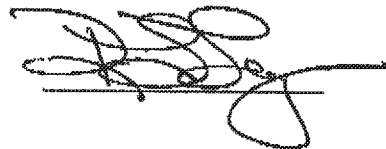
FOR RESPONDENT WHOLE FOODS MARKET ROCKY MOUNTAIN/SOUTHWEST, L.P.:

Date: 1/18/17



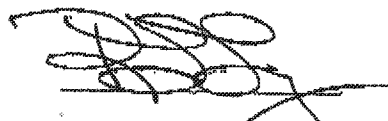
FOR RESPONDENT WFM NORTHERN NEVADA, INC.:

Date: 1/18/17



FOR RESPONDENT WFM SOUTHERN NEVADA, INC.:

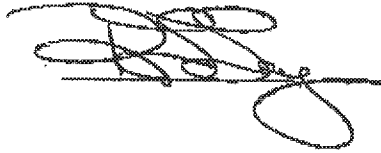
Date: 1/18/17



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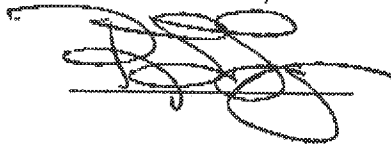
FOR RESPONDENT WFM HAWAII, LLC:

Date: 1/18/17



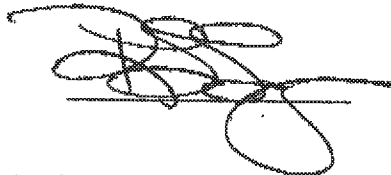
FOR RESPONDENT WFM KANSAS, LLC:

Date: 1/18/17



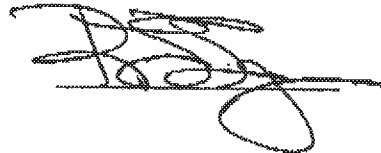
FOR RESPONDENT WFM-WO, INC.:

Date: 1/18/17



FOR RESPONDENT NATURE'S HEARTLAND, INC.:

Date: 1/18/17



FOR RESPONDENT WFM NEBRASKA, LLC:

Date: 1/18/17



FOR RESPONDENT WHOLE FOODS MARKET LUSHER COURT FRISCO CO, LLC:

Date: 1/18/17



Message

From: Welles, Laura [Welles.Laura@epa.gov]
Sent: 1/18/2017 9:07:22 PM
To: Fogarty, Johnpc [Fogarty.Lohnpc@epa.gov]
Subject: RE: We are ok with [REDACTED] **Ex. 5 AC/AWP/DP**

ok -- I'll give them the green light on that via email.

I think I'll also follow up with a phone call to Jennifer to see where we are at with the other documents
-- are they ready to sign, etc.

-----Original Message-----

From: Fogarty, Johnpc
Sent: Wednesday, January 18, 2017 4:05 PM
To: Welles, Laura <Welles.Laura@epa.gov>
Subject: We are ok with [REDACTED] **Ex. 5 AC/AWP/DP**

Sent from my iPhone

Message

From: Welles, Laura [Welles.Laura@epa.gov]
Sent: 12/8/2016 3:48:32 PM
To: Fogarty, Johnpc [Fogarty.Johnpc@epa.gov]
Subject: RE: Draft state notification letter

I guess fingers crossed didn't work... Hopefully we'll see feedback to the audit prior to today's call at 2.

At the very least we can go over the questions you sent earlier this week, as well as any other questions/thoughts re: the latest revised CAFO.

From: Fogarty, Johnpc
Sent: Wednesday, December 07, 2016 10:04 AM
To: Welles, Laura <Welles.Laura@epa.gov>
Subject: Re: Draft state notification letter

I defer to you all for how best to do notice for RCRA admin cases - it's outside my bailiwick, but what you say makes sense.

I'm hoping to hear from them today - fingers crossed.

Sent from my iPhone

On Dec 7, 2016, at 10:01 AM, Welles, Laura <Welles.Laura@epa.gov> wrote:

Attached is a draft notification letter to the states re: notice of enforcement action. I used a WEB example, but changed it slightly (e.g., specified that it's an administrative action, etc.).

I'm thinking that it might be good to send via email, as well as return receipt requested. I have most of the POCs for the states – I'm waiting on two more regions to send info.

It may seem early for getting this done, but I don't want to forget... I'm thinking we send once we have agreement on terms. RCRA section 3008(a)(2) is silent on time re: notice – it just says give notice to the state prior to issuing an order or commencing a civil action.

Also – I'm hoping to connect with Gary this morning re: WF's proposed language in paragraph 49.

<DraftNoticetoNew Jersey_WFM.docx>

Message

From: Welles, Laura [Welles.Laura@epa.gov]
Sent: 12/7/2016 4:11:38 PM
To: Fogarty, Johnpc [Fogarty.Johnpc@epa.gov]
Subject: RE: Draft state notification letter

Got it.

Yes – hopefully we'll hear from them today.

From: Fogarty, Johnpc
Sent: Wednesday, December 07, 2016 10:04 AM
To: Welles, Laura <Welles.Laura@epa.gov>
Subject: Re: Draft state notification letter

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Also – I'm hoping to connect with Gary this morning re: WF's proposed language in paragraph 49.

<DraftNoticetoNew Jersey_WFM.docx>

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Charles Maack
New Jersey Department of Environmental Protection
Bureau of Hazardous Waste Enforcement
Mail Code 09-03
P.O. Box 420
Trenton, NJ 08625-0420

Re: Enforcement Action Notice
Whole Foods Market Retail Grocery Stores – Nationwide Administrative Settlement

Dear Mr. Maack:

This is to notify you pursuant to Section 3008(a)(2) of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6928(a)(2), that the U.S. Environmental Protection Agency plans to commence and conclude an administrative enforcement action under Section 3008 of RCRA, 42 U.S.C. § 6928, against certain Whole Foods Market companies, including Whole Foods Market Group, Inc. This action involves violations of RCRA—failure to properly conduct hazardous waste determinations at its stores, as well as the improper handling of universal waste (spent fluorescent lamps).

If you have any questions concerning this matter, please contact Laura Welles of my staff at 202-564-2754 or welles.laura@epa.gov.

Sincerely,

Andy Crossland, Acting Chief
Waste Enforcement Branch
Waste and Chemical Enforcement Division

Message

From: Jennifer Hartman King [JHartmanKing@kingwilliamslaw.com]
Sent: 12/21/2016 2:25:17 PM
To: Fogarty, Johnpc [Fogarty.Johnpc@epa.gov]; Welles, Laura [Welles.Laura@epa.gov]
Subject: CAFO
Attachments: USEPA - WFM CAFO (12-20-16) (00014078xD64DF).docx

Jennifer Hartman King, Managing Partner



520 Capitol Mall, Suite 750
Sacramento, CA 95814
916-379-7530 – Main phone
916-379-7533 – Direct dial
916-379-7535 – Fax
Email: JHartmanKing@KingWilliamsLaw.com

Website: www.KingWilliamsLaw.com
[Click Here for King Williams LLP News and Alerts](#)

This email and any transmission with it may contain privileged or otherwise confidential information. If you are not the intended recipient, or believe that you have received this communication in error, please advise the sender via reply email and delete the email you received.

_____ This email and any transmission with it may contain privileged or otherwise confidential information. If you are not the intended recipient, or believe that you have received this communication in error, please advise the sender via reply email and delete the email you received.

**BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.**

IN THE MATTER OF:	)	EPA Docket No.
	)	RCRA-HQ-2016-_____
)	
)	
Whole Foods Market Group, Inc.,	)	Proceeding Under Section 3008(a) of the
Whole Foods Market California, Inc.,	)	Resource Conservation and Recovery Act,
Mrs. Gooch’s Natural Food Markets, Inc.,	)	42 U.S.C. § 6928(a)
Whole Foods Market Pacific Northwest, Inc.,)	
Whole Foods Market Rocky Mountain/ Southwest, L.P.,)	
WFM Northern Nevada, Inc.,)	
WFM Southern Nevada, Inc.,)	
WFM Hawaii, LLC, and)	
WFM Kansas, LLC,)	
)	
RESPONDENTS.)	

CONSENT AGREEMENT AND FINAL ORDER

I. PRELIMINARY STATEMENT

1. Complainant, the United States Environmental Protection Agency (“EPA”), and Respondents, Whole Foods Market Group, Inc., a Delaware corporation, Whole Foods Market California, Inc., a California corporation, Mrs. Gooch’s Natural Food Markets, Inc., a California corporation, Whole Foods Market Pacific Northwest, Inc., a Delaware Corporation, Whole Foods Market Rocky Mountain/Southwest, L.P., a Texas limited partnership, WFM Northern Nevada, Inc., a Delaware Corporation, WFM Southern Nevada, Inc., a Delaware Corporation, WFM Hawaii, LLC, a Hawaii limited liability company, and WFM Kansas, LLC, a Kansas limited liability company (collectively the “Respondents” or “Whole Foods Market”), hereby enter into this Consent Agreement (“Agreement” or “Consent Agreement”), and the attached proposed Final

**10/18/2016 DRAFT CAFO sent to Whole Foods Market with WFM Revisions – EPA edits
11-10-2016 – WFM Revisions 12-1-16 – EPA edits 12-13-16 – WFM edits 12-20-16**

Order (collectively, the “CAFO”) before taking testimony and without adjudication of any issues of fact or law herein.

2. Complainant and Respondents, having conferred for the purposes of settlement pursuant to the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (“Consolidated Rules”), 40 C.F.R. § 22.18, and expressing a mutual desire to enter into a global agreement covering the Whole Foods Market Stores identified in Appendix A of this CAFO, which is attached hereto and incorporated by reference herein, have agreed to the execution of this CAFO. Respondents hereby agree to comply with the terms of this CAFO.

3. For the purposes of this CAFO and in accordance with the specific requirements for settlement set forth in 40 C.F.R. § 22.18(b)(2):

- a. Respondents admit the jurisdictional allegations set forth in this CAFO;
- b. Respondents neither admit nor deny the factual allegations and legal conclusions contained in this CAFO;
- c. Respondents consent to the assessment and payment of the civil penalty in the amount and by the method set forth in this CAFO;
- d. Respondents consent to the terms and conditions specified in the compliance provisions set forth in this CAFO; and
- e. Respondents consent to perform the Supplemental Environmental Projects set forth in this CAFO.

Commented [KW1]: Okay

4. The Respondents waive any right they may have to contest the allegations set forth in this CAFO and any right to appeal the proposed Final Order set forth herein. 40 C.F.R. §

22.18(b)(2). Respondents do not waive any claims or defenses Respondents have to the interpretation of this CAFO or its terms.

II. THE PARTIES

5. Gregory Sullivan, Acting Director, Waste and Chemical Enforcement Division, Office of Civil Enforcement, Office of Enforcement and Compliance Assurance, is authorized, by lawful delegation, to initiate and settle civil administrative actions brought pursuant to Section 3008(a) of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976 and the Hazardous and Solid Waste Amendments (“HSWA”) of 1984 (collectively, “RCRA”), 42 U.S.C. § 6928(a).

6. Respondents own and operate the Whole Foods Market Stores identified in Appendix A, as specified therein, of this CAFO.

III. JURISDICTION

7. The parties agree to the commencement and conclusion of this matter through the issuance of this CAFO, which is authorized pursuant to Section 3008(a) of RCRA, 42 U.S.C. § 6928(a) and the Consolidated Rules, 40 C.F.R. §§ 22.13(b) and 22.18(b)(2) and (3).

8. RCRA Subtitle C (42 U.S.C. § 6921 *et seq.*) and its implementing regulations, set forth in 40 C.F.R. Parts 260-279, comprise EPA’s RCRA hazardous waste program. Section 3006(b) of RCRA, 42 U.S.C. § 6926(b), allows the Administrator to authorize a state to administer its own provides that EPA may authorize a state to administer the RCRA hazardous waste program in lieu of the federal program when the Administrator finds that the state program meets certain conditions.¹ A violation of a state provision authorized pursuant to Section 3006 of RCRA, 42

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Commented [KW2]: Okay

¹ Each of the Affected States and Territories described herein, with the exception of Iowa, have received authorization to administer the base RCRA hazardous waste program (requirements imposed by the Solid Waste Disposal Act prior to the Hazardous and Solid Waste Amendments of 1984) in lieu of the federal government’s program. Not all the

**10/18/2016 DRAFT CAFO sent to Whole Foods Market with WFM Revisions – EPA edits
11-10-2016 – WFM Revisions 12-1-16 – EPA edits 12-13-16 – WFM edits 12-20-16**

U.S.C. § 6926, constitutes a violation of a requirement of Subtitle C, and is subject to the assessment of civil penalties and issuance of compliance orders by EPA as provided by Section 3008(a) of RCRA, 42 U.S.C. § 6928(a).

9. Pursuant to RCRA Section 3008(a)(2), 42 U.S.C. § 6928(a)(2), notice of the commencement of this action has been given to all Affected States and Territories.

IV. DEFINITIONS

10. Unless otherwise expressly provided herein, terms used in the CAFO that are defined in RCRA, 42 U.S.C. §§ 6901 *et seq.*, or in regulations promulgated under RCRA, 40 C.F.R. Parts 260-279, or in a state's authorized hazardous waste program, shall have the same meaning in this CAFO as such term has under RCRA or under federal or applicable authorized state regulations. In the case of a conflict between federal and state definitions, federal definitions shall control. Whenever terms defined below are used in this CAFO, such definitions shall apply:

- a. "Affected State and Territory" means a state or territory of the United States in which a Whole Foods Market Store is located as identified in Appendix A of this CAFO. Oklahoma, Texas, Louisiana, New Mexico, and Arkansas are not Affected States for purposes of this CAFO.
- b. "Business Day" means any day other than Saturday, Sunday, or a federal or legal holiday.
- c. "Conditionally Exempt Small Quantity Generator" means a facility that generates 100 kg of hazardous waste or less in a calendar month.

Affected States and Territories described herein are authorized to administer the Universal Waste regulations at 40 C.F.R. Part 273. Thus, where applicable, citations to the Code of Federal Regulations is a citation to the corresponding regulations contained within the Affected State's or Territories' authorized RCRA hazardous waste program.

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**10/18/2016 DRAFT CAFO sent to Whole Foods Market with WFM Revisions – EPA edits
11-10-2016 – WFM Revisions 12-1-16 – EPA edits 12-13-16 – WFM edits 12-20-16**

- d. “Confidential Business Information” or “CBI” shall have the same definition as in 40 C.F.R. §§ 2.201-2.406.
- e. “Consent Agreement and Final Order” or “CAFO” shall mean this Consent Agreement and attached Final Order and all Appendices hereto. In the event of conflict between this Consent Agreement and any Appendix, this Consent Agreement shall control.
- f. “Consumer Products” shall mean any merchandise sold by Respondents at Whole Foods Market Stores, which if discarded, may have to be managed as RCRA hazardous waste.
- g. “Day” means a calendar day unless expressly stated to be a business day. In computing any period of time under this CAFO, where the last day would fall on a Saturday, Sunday, or federal, legal or Affected State or Territory holiday, the period shall run until the close of business of the next business day.
- h. “Effective Date” is defined in Section XVIII of this CAFO.
- i. “EPA” means the United States Environmental Protection Agency.
- j. “Large Quantity Generator” means a facility that generates 1000 kg or more of hazardous waste in a calendar month.
- k. “Notify” and “Submit” and other terms signifying an obligation to transmit or communicate documents and information mean to deliver in person, send via electronic mail, deposit in the U.S. mail or dispatch by express courier so that such transmission or communication arrives to the designated recipient by close of business on the day required by this CAFO. If that required day is not a Business Day then the delivery, deposit, or dispatch shall be made by the close of business the next Business Day.

**10/18/2016 DRAFT CAFO sent to Whole Foods Market with WFM Revisions – EPA edits
11-10-2016 – WFM Revisions 12-1-16 – EPA edits 12-13-16 – WFM edits 12-20-16**

- l. “Paragraph” shall mean a portion of this CAFO identified by an arabic numeral and, in some cases, an associated lower case letter.
- m. “Parties” shall mean Complainant and all Respondents.
- n. “RCRA” means the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 *et seq.*
- o. “Respondents” mean the entities described in Paragraphs 1 and 6 of this CAFO.
- p. “Retail Associate” means a Whole Foods Market Store employee, including store leadership and team members.
- q. “Section” shall mean a portion of this CAFO identified by a roman numeral.
- r. “Small Quantity Generator” means a facility that generates more than 100 kg and less than 1000 kg of hazardous waste in a calendar month.
- s. “Small Quantity Handler of Universal Waste” means a generator of universal waste that does not accumulate 5,000 kilograms or more of universal waste (e.g., batteries, mercury-containing equipment, or fluorescent lamps, calculated collectively) at any time. 40 C.F.R. § 273.9.
- t. “Solid Waste” means any discarded material that is not excluded under 40 C.F.R. § 261.4(a) or that is not excluded by variance granted under §§ 260.30 and 260.31.
- u. “Stores,” “Facilities,” or “Whole Foods Market Stores” mean Whole Foods Market retail grocery stores, or any future Whole Foods Market retail grocery store (including “365 by Whole Foods Market” stores), located in the United States (including Puerto Rico and other U.S. territories).
- v. “United States” means the United States of America, and all of its departments, agencies, and instrumentalities.

- w. “Universal Waste” means certain hazardous wastes that are subject to the universal waste requirements of 40 C.F.R. Part 273, including fluorescent lamps. 40 C.F.R. §§ 273.1 and 273.9.

V. EPA ALLEGATIONS AND DETERMINATIONS

11. Each Respondent is a “person” as defined in Section 1004(15) of RCRA, 42 U.S.C. § 6903(15) and 40 C.F.R. § 260.10.
12. Respondents own and operate the Stores identified in Appendix A, as specified therein, of this CAFO. The stores identified in Appendix A are “facilities” within the meaning of 40 C.F.R. § 260.10.
13. Respondents sell Consumer Products, some of which may become “solid waste” when they are returned, expired, spill or are in a condition such that they cannot be used for their intended purpose.
14. Some of the Consumer Products that become solid waste may be considered hazardous waste under federal or state law by having the characteristic of ignitability (D001), corrosivity (D002), or toxicity (D007, D010, D009, and D011).
15. Most, if not all, Whole Foods Market Stores generate 100 kilograms (“kg”) of hazardous waste or less in any given month, and therefore, are considered Conditionally Exempt Small Quantity Generators (“CESQGs”) pursuant to 40 C.F.R. § 261.5. As CESQGs, the Stores are exempt from regulation under the hazardous waste generator requirements at 40 C.F.R. Part 262 and the notification requirements of RCRA Section 3010 in any given month, provided that the requirements in 40 C.F.R. § 261.5 are met.
16. Between August 2014 and August 2015, EPA Region 6 conducted an investigation of Whole Food Company, Inc. and Respondent Whole Foods Market Rocky Mountain/Southwest,

**10/18/2016 DRAFT CAFO sent to Whole Foods Market with WFM Revisions – EPA edits
11-10-2016 – WFM Revisions 12-1-16 – EPA edits 12-13-16 – WFM edits 12-20-16**

L.P.'s Stores located in Texas, Oklahoma, New Mexico, Louisiana and Arkansas (the "Investigation"). From the Investigation, EPA Region 6 concluded that a sufficient hazardous waste determination was not consistently made on all solid waste streams as required by 40 C.F.R. § 262.11(c), and one or more of the universal waste requirements set forth in 40 C.F.R. §§ 273.13 through 273.16 were not consistently complied with.

17. As a result of the Investigation, EPA Region 6, Whole Food Company, Inc. and Respondent Whole Foods Market Rocky Mountain/Southwest, L.P. entered into consent agreements and final orders for the Stores located within EPA Region 6's jurisdiction (the "Region 6 CAFOs").

~~18. Following the Investigation and Region 6 CAFOs, Although EPA has not conducted its own investigation of the Stores located outside of Texas, Oklahoma, New Mexico, Louisiana and Arkansas, Respondents and voluntarily contacted EPA and the Parties engaged in discussions that led to the Parties them agreeing have mutually agreed to enter into a similar settlement agreement for Stores located in the Affected States and Territories, other than those covered by the Region 6 CAFOs. As part of the settlement discussions, Respondents informed EPA that there were no~~

Commented [KW3]: Okay, with our slight revisions

Commented [KW4R3]: EPA: ok

~~19.18. EPA has not identified any spills, leaks or releases at or from Respondents' Facilities, nor has EPA identified any such spills, leaks or releases.~~

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~~20.19. The Parties' EPA and Respondents have engaged in expedited discussions to reach have resulted in the agreement contained herein, which includes implementation of an enhanced hazardous waste management system in all of Respondents' Stores. This enhanced hazardous waste management system is designed to ensure the proper management of hazardous wastes at all Whole Foods Market Stores, and in many respects goes beyond the minimum requirements~~

**10/18/2016 DRAFT CAFO sent to Whole Foods Market with WFM Revisions – EPA edits
11-10-2016 – WFM Revisions 12-1-16 – EPA edits 12-13-16 – WFM edits 12-20-16**

necessary for compliance with the applicable federal and state hazardous waste laws and regulations. This program is more fully described in Paragraphs ___ of this CAFO and appendices___.

~~21-20~~ Respondents have already taken steps toward implementing their enhanced hazardous waste management program, prior to the Effective Date of this CAFO.

Hazardous Waste Determinations

~~22-21~~ Pursuant to 40 C.F.R. § 262.11, a person who generates a solid waste is required to determine if that waste is hazardous.

~~23-22~~ Based upon the terms of the Region 6 CAFOs, and without a nationwide any independent investigation, or any admission of liability ~~or guilt~~ by Respondents, EPA has concluded that Respondents did not make sufficient hazardous waste determinations at all Whole Foods Market Stores as required by 40 C.F.R. § 262.11.

Commented [KW5]: We prefer to keep this phrase; other revisions are fine

Commented [KW6R5]: John F. will talk with administrative process experts. If they can, they'll include it.

Universal Waste Management

~~24-23~~ Pursuant to 40 C.F.R. § 273.10, a small quantity handler of universal waste must comply with the applicable requirements at 40 C.F.R. §§ 273.10 through 273.20.

~~25-24~~ Based upon the terms of the Region 6 CAFOs, and without a nationwide any independent investigation, or any admission of liability ~~or guilt~~ by Respondents, EPA has concluded that Respondents did not sufficiently comply with some of the standards set forth in 40 C.F.R. §§ 273.13 through 273.16 at all Whole Foods Market Stores.

Commented [KW7]: Same as preceding comment

VI. TERMS OF SETTLEMENT

~~26-25~~ Based on the foregoing, the Parties agree to the entry of this Consent Agreement on the terms set forth herein.

A. Compliance Provisions

**10/18/2016 DRAFT CAFO sent to Whole Foods Market with WFM Revisions – EPA edits
11-10-2016 – WFM Revisions 12-1-16 – EPA edits 12-13-16 – WFM edits 12-20-16**

~~27-26~~ Although a majority of Whole Foods Market Stores may qualify as CESQGs in any given month, pursuant to 40 C.F.R. § 261.5, the enhanced hazardous waste management program implemented by Respondents at Whole Foods Market Stores, as referenced in Paragraphs ____ through ____ and Appendices ____ through ____ of this CAFO, generally seeks to satisfy the hazardous waste generator requirements applicable to Small Quantity Generators (“SQGs”) and, therefore, goes above and beyond the minimum requirements applicable under the law.

~~28-27~~ As a condition of settlement, Respondents agree to implement the following measures as part of their enhanced hazardous waste management program:

- a. If applicable, Respondents shall obtain an EPA identification number for a Whole Foods Market Store pursuant to 40 C.F.R. § 262.12.
- b. Respondents must make a hazardous waste determination on all solid waste generated in its Stores pursuant to 40 C.F.R. § 262.11. As a means of complying with this requirement, Respondents have implemented, and will continue to implement Regional and/or State-specific hazardous waste determination guidance charts. These Regional and/or State-specific hazardous waste determination guidance charts are described and set forth in Appendix B of this CAFO. These charts are marked as and considered Confidential Business Information pursuant to 40 C.F.R. Part 2.

~~Respondents must implement an electronic hazardous waste identification system as follows:~~

~~Within _____ months/days of the Effective Date of this CAFO, Respondents will hire a third-party consultant to review the Consumer Products at its Stores, and determine whether those~~

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10/18/2016 DRAFT CAFO sent to Whole Foods Market with WFM Revisions – EPA edits
11-10-2016 – WFM Revisions 12-1-16 – EPA edits 12-13-16 – WFM edits 12-20-16

~~Consumer Products, if discarded, would become hazardous waste pursuant to federal and state law and regulations.~~
~~The third-party consultant, After identifying the potentially hazardous items are identified, the third-party consultant or other qualified personnel will load the information into Respondents' electronic hazardous waste identification system for use at Whole Foods Market Stores in identifying and classifying all solid waste streams, which may include the use of hand-held scanners, in-store computer terminal or other computer-based system(s).~~
~~c. Within _____ months of the Effective Date of this CAFO, the Respondents' electronic hazardous waste identification system will be fully implemented at its Stores. This system is described and set forth in Appendix C of this CAFO. This system is marked as and considered Confidential Business Information pursuant to 40 C.F.R. Part 2.~~

~~d. To the extent Consumer Products become hazardous waste, Respondents have implemented, and will continue to implement a system to properly accumulate and store hazardous waste on-site per many of the requirements applicable to SQGs, including, but not limited to, inspections and management of containers. This system, commonly referred to as the "bucket" or "tote" system, accumulates and stores hazardous waste until it is picked up by a licensed hazardous waste hauler for proper off-site transport and disposal. Under this system, Respondents maintain~~

Commented [KW9]: We need to avoid any implication that WFM is agreeing to comply with all of the requirements that apply to SQGs

**10/18/2016 DRAFT CAFO sent to Whole Foods Market with WFM Revisions – EPA edits
11-10-2016 – WFM Revisions 12-1-16 – EPA edits 12-13-16 – WFM edits 12-20-16**

records, such as manifests, to demonstrate proper off-site transport and disposal at their Stores. The “bucket” or “tote” system and the associated quick-reference materials for Retail Associates are further described and set forth in Appendix CD of this CAFO. This system is marked as and considered Confidential Business Information pursuant to 40 C.F.R. Part 2.

e.d. Respondents have implemented, and will continue to implement hazardous waste management trainings at its Stores for all Retail Associates. The hazardous waste management training materials for Retail Associates are further described in Attachment DE of this CAFO. The training materials are marked as and considered Confidential Business Information pursuant to 40 C.F.R. Part 2.

Commented [KW10]: Leaving this in subject to penalty discussions

28. Respondents shall continue their efforts to implement an electronic hazardous waste identification system as follows:

Commented [KW11]: Unfortunately, this needs to be permissive, due to operational uncertainties and potential technical roadblocks

a. Respondents will consult a third-party to review the Consumer Products at its Stores, and determine whether those Consumer Products, if discarded, would become hazardous waste pursuant to federal and state law and regulations.

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b. After the potentially hazardous items are identified, if Whole Foods determines that implementation of the electronic hazardous waste identification system is operationally and technologically feasible, the third-party consultant or other qualified personnel will load the information into Respondents' electronic hazardous waste identification system for use at Whole Foods Market Stores in identifying and classifying all solid waste streams, which may include the use of hand-held scanners, in-store computer terminal or other computer-based system(s).

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10/18/2016 DRAFT CAFO sent to Whole Foods Market with WFM Revisions – EPA edits
11-10-2016 – WFM Revisions 12-1-16 – EPA edits 12-13-16 – WFM edits 12-20-16

c. If within twenty-four (24) months after the effective date of this CAFO, Respondent concludes that despite its best efforts to implement the electronic hazardous waste identification system described in this compliance agreement, the efforts were futile and the system would be impractical for Whole Foods, Whole Foods shall, no later than 30 days after such conclusions are made, submit to the EPA a report documenting its efforts and the rationale for its conclusion.

4.29. In order to assist its Stores in implementing Respondents' enhanced hazardous waste management program described in Paragraph 27~~35~~ of this CAFO, Respondents will develop and implement standard operating procedures ("SOPs") for use by Retail Associates at their Stores. These SOPs will be available and accessible to Retail Associates. These procedures are further described in Attachment ~~11~~ of this CAFO. The SOPs are marked as and considered Confidential Business Information pursuant to 40 C.F.R. Part 2.

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30. No later than March 31, 2018, and annually thereafter until termination of this CAFO, Respondents must submit an annual report to EPA for the preceding calendar year that shall include: ~~a list of any items identified by the third party consultant described in Paragraph 27(c)(i);~~ implementation progress of its electronic hazardous waste identification system described in Paragraph 28~~7~~(c)(ii) and (iii), including a description of the technology used for the system; ~~and any other changes or updates associated with its enhanced hazardous waste management program, as described in Paragraphs 27 and 28 and Appendices~~ of this CAFO. These annual reports will be marked as and considered Confidential Business Information pursuant to 40 C.F.R. Part 2.

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Commented [JH(C13)]: Either we take this out or we need to better define what "issues" means. Again, I'm worried that the way this is written leads to us essentially turning ourselves in to the cops.

Commented [KW14]: Operationally infeasible; left remainder subject to penalty discussion

2.31. Third Party Audit [To Be Discussed]

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10/18/2016 DRAFT CAFO sent to Whole Foods Market with WFM Revisions – EPA edits
11-10-2016 – WFM Revisions 12-1-16 – EPA edits 12-13-16 – WFM edits 12-20-16

3.32. In all instances in which this CAFO requires written submission to EPA, each submission must be signed by a responsible corporate officer of Whole Foods Market and include the following certification: Respondents must certify that they are complying with the requirements set forth in Paragraphs _____ above, within _____ days of the schedule provided for completion in Appendix _____. The certification and supporting documentation should be provided to:

I certify under penalty of law that I have personally examined and am familiar with the information submitted in this document and all documents submitted herewith; that, to the best of my knowledge and belief, the submitted information is true, accurate, and complete; and that all documents submitted herewith are complete and authentic, unless otherwise indicated. I am aware that there are significant penalties for submitting false information, including the possibility of fine or imprisonment.

Greg Sullivan, Acting Division Director
Waste and Chemical Enforcement Division
Office of Civil Enforcement
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., N.W. (2349A)
Washington, DC 20460

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B. Civil Penalty

4.33. Respondents agree to pay a civil penalty in the sum of \$ _____ within thirty (30) _____ days of the Effective Date of this CAFO.

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5.34. Respondents must pay the assessed civil penalty by either cashier's check, certified check, or wire transfer, made payable to: **Treasurer, United States of America**. Payment must be remitted in one of three (3) ways: regular U.S. Postal mail (including certified mail), overnight mail, or wire transfer. For regular U.S. Postal mail, U.S. Postal Service certified mail, or U.S. Postal Service express mail, the check should be remitted to:

United States Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center

10/18/2016 DRAFT CAFO sent to Whole Foods Market with WFM Revisions – EPA edits
11-10-2016 – WFM Revisions 12-1-16 – EPA edits 12-13-16 – WFM edits 12-20-16

P.O. Box 979077
St. Louis, Missouri 63197-9000

For overnight mail (non-U.S. Postal Service, e.g. Fed Ex), the check should be remitted to:

U.S. Bank
Government Lockbox 979077
U.S. EPA Fines and Penalties
1005 Convention Plaza
SL-MO-C2-GL
St. Louis, Missouri 63101
Phone No. (314) 425-1818

For wire transfer, the payment should be remitted to:

Federal Reserve Bank of New York
ABA Routing Number: 021030004
Account Number: 68010727
SWIFT address: FRNYUS33
33 Liberty Street
New York, NY 10045
Field Tag 4200 of the Fedwire message should read: "D 68010727 Environmental
Protection Agency"

The case name and document number (In the Matter of Whole Foods Market Group, Inc., et. al.,

Docket No. RCRA-HQ-2016-____) must be clearly documented on or within Respondents'

chosen method of payment to ensure proper credit.

4-35 Respondents shall submit a copy of the payment to the following addresses:

U.S. Environmental Protection Agency
Clerk of the Board
Environmental Appeals Board
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460-0001

Laura Welles, Attorney-Advisor
Waste and Chemical Enforcement Division
Office of Civil Enforcement
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W. (MC 2249A)
Washington, D.C. 20460

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10/18/2016 DRAFT CAFO sent to Whole Foods Market with WFM Revisions – EPA edits
11-10-2016 – WFM Revisions 12-1-16 – EPA edits 12-13-16 – WFM edits 12-20-16

~~7-36~~ Penalties paid pursuant to this CAFO are not deductible for federal purposes under
26 U.S.C. § 162(f).

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~~8-37~~ Pursuant to 31 U.S.C. § 3717 and 40 C.F.R. § 13.11, unless otherwise prohibited
by law, EPA will assess interest and late payment penalties on debts owed to the
United States and a charge to cover the costs of processing and handling the
delinquent claim. Interest on the civil penalty assessed in this CAFO will begin to
accrue thirty (30) days after the effective date of the CAFO and will be recovered
by EPA on any amount of the civil penalty that is not paid by the respective due
date. In accordance with 31 U.S.C. § 3717 and 40 C.F.R. § 13.11, Respondents
must pay the following amounts on any amount overdue:

- a. Interest. Any unpaid portion of a civil penalty must bear interest at the rate
established by the Secretary of the Treasury pursuant to 31 U.S.C. § 3717(a)(1).
Interest will therefore begin to accrue on a civil penalty or stipulated penalty if it is
not paid by the last date required. Interest will be assessed at the rate of the United
States Treasury tax and loan rate in accordance with 40 C.F.R. § 13.11(a).
- b. Monthly Handling Charge. Respondents must pay a late payment handling charge
of fifteen (\$15.00) on any late payment, with an additional charge of \$15.00 for
each subsequent thirty (30) day period over which an unpaid balance remains.
- c. Non-payment Penalty. On any portion of a civil penalty more than ninety (90) days
past due, Respondents must pay a non-payment penalty charge of six percent (6%)
per annum, which will accrue from the date the penalty payment became due and
is not paid. 40 C.F.R. § 13.11(c). This non-payment penalty charge is in addition
to charges which accrue or may accrue under subparagraphs (a) and (b).

C. Supplemental Environmental Project

38. [Terms TBD]

Delay in Performance/Stipulated Penalties

Respondents shall be liable for stipulated penalties to the EPA as specified below for failure to comply with the requirements of this CAFO, unless excused by EPA in its sole discretion. Respondents must pay stipulated penalties for the following obligations in the amounts set forth below: (a) for failure to timely submit reports; for failure to complete SEDs; or for failure to comply with Paragraphs _____ of this CAFO.

<u>Period of Failure to Comply</u>	<u>Penalty Per Violation Per Day</u>
<u>1st through 7th day</u>	<u>\$100.00</u>
<u>8th through 21st day</u>	<u>\$250.00</u>
<u>22nd through 30th day</u>	<u>\$500.00</u>
<u>Greater than 30 days</u>	<u>\$1,000</u>

9.39. Payment of stipulated penalties will not alter in any way Whole Foods Market's obligation to comply with the requirements of this CAFO.

VII. DISPUTE RESOLUTION

10.40. The dispute resolution procedures set forth in this Section shall be the exclusive mechanism to resolve any disputes arising under or with respect to this CAFO.

11.41. The Parties agree to meet and confer informally and in good faith to resolve all disputes arising from this CAFO. If Respondents disagree, in whole or

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in part, with any decision by EPA regarding this CAFO, Respondents agree to notify EPA, through the Chief of the Waste Enforcement Branch, and the Parties agree to use best efforts to informally and in good faith resolve their dispute. If EPA disagrees, in whole or in part, with any action or inaction taken by a Respondent under this CAFO, EPA agrees to notify Respondent, and the Parties agree to use their best efforts to informally and in good faith resolve their dispute.

VIII. OTHER MATTERS

42. Respondents' full compliance with this Consent Agreement shall only resolve Respondents' liability for federal civil penalties for the violations alleged in Section V (EPA Allegations and Determinations) of this CAFO. This CAFO does not affect the right of U.S. EPA or the United States to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violations of law.

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12.43. Nothing in this CAFO shall relieve Respondents of the duty to comply with all applicable provisions of RCRA and any other federal, state, or local laws and regulations.

Commented [KW17]: We don't believe this is required under the Suzuki memo or 40 CFR 22.18(c). Let's discuss.

44. Notwithstanding any other provision of this CAFO, nothing in this CAFO shall be construed to limit the authority of the EPA to take any action against Respondents to address conditions that may present an imminent and substantial endangerment to human health or the environment. Complainant reserves the right to take enforcement action against Respondents for any

future violations of RCRA and the implementing regulations and to enforce the terms and conditions of this CAFO.

~~13.45~~ EPA and Respondents agree that Respondents reserve all of their rights and defenses should this Consent Agreement be voided in whole or in part. EPA and Respondents further agree that Respondents' have no obligations under this Consent Agreement will cease should it this Agreement be rejected by the Environmental Appeals Board (the "EAB"), provided, however, that in the event that the EAB expresses any objections to, or its intent to reject this Consent Agreement, the Parties agree that they shall exercise their mutual best efforts to address and resolve the EAB's objections. All terms in the CAFO being material, in the event the EAB rejects or changes any portion of this CAFO the parties shall have the right to repudiate the entire CAFO in the event they are unable to reach agreement on the EAB's proposed changes or objections.

Commented [KW18]: Okay subject to slight revisions

~~14.46~~ Unless specifically allowed under the terms of this CAFO, this CAFO may be amended or modified only by written agreement executed by both the EPA and each Respondent.

~~47~~ The terms of this CAFO binds the ~~Respondents~~Parties and their successors and assigns.

Commented [KW19]: Okay with slight revision to make the provision reciprocal

~~15.48~~ The undersigned representative of each party to this CAFO certifies that each is duly authorized by the party whom he or she represents to enter into these terms and conditions and to legally bind that party to it.

10/18/2016 DRAFT CAFO sent to Whole Foods Market with WFM Revisions – EPA edits
11-10-2016 – WFM Revisions 12-1-16 – EPA edits 12-13-16 – WFM edits 12-20-16

~~16.49~~ Unless otherwise specified herein, whenever notice is required to be given, whenever a report or other document is required to be forwarded by one party to another, or whenever a submission or demonstration is required to be made, it must be directed to the individuals specified below at the addresses given, unless these individuals or their successors give notice in writing to the other parties that another individual has been designated to receive the communication:

Complainant:

Chief, Waste Enforcement Branch
Waste and Chemical Enforcement Division
Office of Civil Enforcement
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W. (MC 2249A)
Washington, D.C. 20460

Respondents:

Whole Foods Market Central Office
Attn: John H. Hempfling II
550 Bowie Street
Austin, TX 78703

With copy to:

King Williams LLP
Attn: Jennifer Hartman King
520 Capitol Mall, Ste 750
Sacramento, CA 95814

~~17.50~~ At such time as the Respondents believe it has completed all of the requirements of this CAFO, Respondents shall so certify in writing and in accordance with the certification language set forth in Paragraph ~~31~~. Unless EPA objects in writing within sixty (60) days of receipt of

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10/18/2016 DRAFT CAFO sent to Whole Foods Market with WFM Revisions – EPA edits
11-10-2016 – WFM Revisions 12-1-16 – EPA edits 12-13-16 – WFM edits 12-20-16

Respondents' certification, then this CAFO shall terminate on the basis of Respondents' certification.

~~18.51~~ The headings in this CAFO are for convenience of reference only and shall not affect the interpretation of this CAFO.

~~19.52~~ The Parties to this CAFO shall bear their own costs and attorneys' fees in this matter.

~~20.53~~ This CAFO and the attached proposed Final Order shall become effective upon execution of the Final Order by EAB and filing with the Clerk of the EAB (The "Effective Date") of this CAFO is the date the Final Order is filed with the Environmental Appeals Board (the "EAB"). 40 C.F.R. §§ 22.18(b)(2) and 22.31(b).

~~29. EPA and Respondents agree that Respondents reserve all of their rights and defenses should this Consent Agreement be voided in whole or in part. EPA and Respondents further agree that Respondents' obligations under this Consent Agreement will cease should this Agreement be rejected by the EAB; provided, however, that in the event that the EAB expresses any objections to, or its intent to reject this Consent Agreement, the Parties agree that they shall exercise their mutual best efforts to address and resolve the EAB's objections.~~

Commented [KW20]: Changed to be consistent with 40 CFR section 22.31(b), which we read to mean that the order is effective upon its filing by EAB, not its filing with EAB. This is important to avoid the risk of being required to comply with the Final Order before EAB approves it. A similar provision was included in the Penn National Gaming CAFO (Docket No. HQ 2011-5015, ¶ 69).

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10/18/2016 DRAFT CAFO sent to Whole Foods Market with WFM Revisions – EPA edits
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AGREED AND CONSENTED TO:

FOR COMPLAINANT:

Date: _____

Greg Sullivan, Acting Director
Waste and Chemical Enforcement Division
Office of Civil Enforcement
Office of Enforcement and Compliance Assurance
United States Environmental Protection Agency

Date: _____

(Counsel for Complainant)
Waste and Chemical Enforcement Division
Office of Civil Enforcement
Office of Enforcement and Compliance Assurance
United States Environmental Protection Agency

10/18/2016 DRAFT CAFO sent to Whole Foods Market with WFM Revisions – EPA edits
11-10-2016 – WFM Revisions 12-1-16 – EPA edits 12-13-16 – WFM edits 12-20-16

FOR RESPONDENT WHOLE FOODS MARKET GROUP, INC.:

Date: _____

FOR RESPONDENT WHOLE FOODS MARKET CALIFORNIA, INC.:

Date: _____

FOR RESPONDENT MRS. GOOCH'S FOOD MARKETS, INC.:

Date: _____

FOR RESPONDENT WHOLE FOODS MARKET PACIFIC NORTHWEST, INC.:

Date: _____

FOR RESPONDENT WHOLE FOODS MARKET ROCKY MOUNTAIN/SOUTHWEST, L.P.:

Date: _____

FOR RESPONDENT WFM NORTHERN NEVADA, INC.:

Date: _____

FOR RESPONDENT WFM SOUTHERN NEVADA, INC.:

Date: _____

10/18/2016 DRAFT CAFO sent to Whole Foods Market with WFM Revisions – EPA edits
11-10-2016 – WFM Revisions 12-1-16 ... EPA edits 12-13-16 ... WFM edits 12-20-16

FOR RESPONDENT WFM HAWAII, LLC:

Date: _____

FOR RESPONDENT WFM KANSAS, LLC:

Date: _____

**BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.**

In re:)	
)	
)	
Whole Foods Market Group, Inc.,	)	Docket No. RCRA-HQ-2016-_____
Whole Foods Market California, Inc.)	
Mrs. Gooch's Natural Food Markets, Inc.,)	
Whole Foods Market Pacific Northwest, Inc.,)	
and Whole Foods Market Rocky Mountain/)	
Southwest, L.P.,)	
)	

FINAL ORDER

Pursuant to 40 C.F.R. § 22.18(b)-(c) of EPA's Consolidated Rules of Practice, the attached Consent Agreement resolving this matter is incorporated by reference into this Final Order and is hereby ratified.

The Respondents are ORDERED to comply with the terms of the Consent Agreement, effective immediately.

So ordered.¹

Dated: _____

Judge, Environmental Appeals Board

¹ The three-member panel ratifying this matter is composed of Environmental Appeals Judges _____.

CERTIFICATE OF SERVICE

I certify that copies of the foregoing “Consent Agreement” and “Final Order” in the matter of Whole Foods Market Group, Inc., et al., Docket No. RCRA-HQ-2016-____, were filed and copies of the same were sent to the following person in the manner indicated below:

Via Interoffice Mail:

Laura K. Welles, Esq.
Waste and Chemical Enforcement Division
Office of Civil Enforcement
1200 Pennsylvania Ave., NW (Mail Code 2249A)
Washington, DC 20460

Via U.S. Certified Mail:

John H. Hempfling II, Esq.
Whole Foods Market Central Office
550 Bowie Street
Austin, TX 78703

Jennifer Hartman King, Esq.
King Williams LLP
520 Capitol Mall, Ste 750
Sacramento, CA 95814

Message

From: Welles, Laura [Welles.Laura@epa.gov]
Sent: 12/20/2016 8:18:06 PM
To: Fogarty, Johnpc [Fogarty.Johnpc@epa.gov]
Subject: RE: WFM draft RCRA penalty calculations
Attachments: Draft chart with RCRA penalty adjustments.pdf

I counted 399 stores based on the lists WFM sent today. As John and Jenn indicated this morning, this # will change based on new stores that recently opened, etc.

Ex. 5 AC/AWP/DP

Ex. 5 AC/AWP/DP

I've done a number of different calculations with various downward adjustments – before I send them to you I wanted to share the one that I think fits what we are looking for – it's has the best range, etc.

Ex. 5 AC/AWP/DP

Ex. 5 AC/AWP/DP

Thoughts/reactions? Does this make sense?

Laura Welles
Attorney Advisor
Waste and Chemical Enforcement Division
Office of Civil Enforcement
U.S. Environmental Protection Agency
(202) 564-2754

From: Fogarty, Johnpc
Sent: Tuesday, December 20, 2016 11:39 AM
To: Welles, Laura <Welles.Laura@epa.gov>
Subject: Re: WFM draft RCRA penalty calculations

Ex. 5 AC/AWP/DP

From: Welles, Laura
Sent: Tuesday, December 20, 2016 11:32 AM
To: Fogarty, Johnpc
Subject: FW: WFM draft RCRA penalty calculations

Also – unless you say otherwise I'll use this concept **Ex. 5 AC/AWP/DP** in crunching the penalty and SEP numbers.

From: Fogarty, Johnpc
Sent: Friday, December 09, 2016 10:44 AM
To: Welles, Laura <Welles.Laura@epa.gov>
Subject: RE: WFM draft RCRA penalty calculations

Ex. 5 AC/AWP/DP

Ex. 5 AC/AWP/DP

Does this make sense?

62

From: Welles, Laura
Sent: Thursday, December 08, 2016 5:23 PM
To: Fogarty, Johnpc <Fogarty.Johnpc@epa.gov>
Subject: FW: WFM draft RCRA penalty calculations

See attached - these are the most recent calculations.

From: Welles, Laura
Sent: Monday, November 28, 2016 4:53 PM
To: Fogarty, Johnpc <Fogarty.Johnpc@epa.gov>
Subject: WFM draft RCRA penalty calculations

I've been thinking about the draft penalty calculations.

Ex. 5 AC/AWP/DP

Ex. 5 AC/AWP/DP

Ex. 5 AC/AWP/DP

Ex. 5 AC/AWP/DP

Ex. 5 AC/AWP/DP

It's been awhile since we've heard from WFM and so I'm thinking it might be worth it to send an email to John and Jenn to check in...

Laura Welles
Attorney Advisor
Waste and Chemical Enforcement Division
Office of Civil Enforcement
U.S. Environmental Protection Agency
(202) 564-2754

Message

From: Fogarty, Johnpc [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=8546B387C687410D88EEEE387DADDF56-JFOGAR02]
Sent: 12/5/2016 7:52:26 PM
To: Jennifer Hartman King [JHartmanKing@kingwilliamslaw.com]; John Hempfling (CE CEN) [John.Hempfling@wholefoods.com]; Welles, Laura [Welles.Laura@epa.gov]
Subject: RE: [CONFIDENTIAL SETTLEMENT COMMUNICATION] Checking in & proposed meeting dates (plus revised CAFO)

Jennifer and John –

We've had a chance to go over the markup, and in advance of talking later this week we have some questions to help us understand the thinking for some of the revisions in your draft.

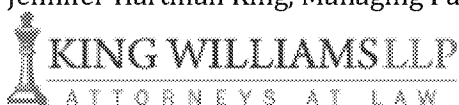
- Four legal entities were added as named parties – why were they added? Do these entities own stores?
- Under the Compliance Provisions section, what is WFM's hesitancy for keeping the following language in the CAFO:
 - electronic hazardous waste identification system is a handheld terminal (or equivalent)
 - more specifics regarding accumulation and storage of hazardous waste on-site
 - more specifics regarding maintaining records/documents to demonstrate proper off-site transport and disposal
- Does WFM plan to fully implement its enhanced hazardous waste management program within one year of the Effective Date of the CAFO (relates to the redline striking the annual progress report)?
- Why did WFM remove the stipulated penalties section? These are pretty standard, and of course were in the CAFOs with Region 6.
- We are also curious why the Force Majeure section was struck – we would have thought WFM would want this protection.
- Finally, Paragraph 49 of our draft was struck – recall this is language that the EAB now insists on (we had sent you their memorandum about this, in connection with their rejection of a settlement that did not comport with 40 CFR 22.18(c)) – so it's not clear why this was deleted from your draft.

Thanks!

From: Jennifer Hartman King [mailto:JHartmanKing@kingwilliamslaw.com]
Sent: Friday, December 02, 2016 2:31 AM
To: Fogarty, Johnpc <Fogarty.Johnpc@epa.gov>; John Hempfling (CE CEN) <John.Hempfling@wholefoods.com>; Welles, Laura <Welles.Laura@epa.gov>
Subject: RE: [CONFIDENTIAL SETTLEMENT COMMUNICATION] Checking in & proposed meeting dates (plus revised CAFO)

Great. Let's plan for 2:00 p.m. eastern. I will send a calendar invitation. Thank you.

Jennifer Hartman King, Managing Partner



520 Capitol Mall, Suite 750

Sacramento, CA 95814
916-379-7530 – Main phone
916-379-7533 – Direct dial
916-379-7535 – Fax
Email: JHartmanKing@KingWilliamsLaw.com

Website: www.KingWilliamsLaw.com
[Click Here for King Williams LLP News and Alerts](#)

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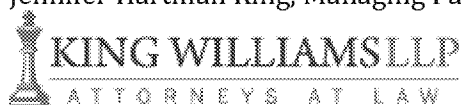
From: Fogarty, Johnpc [<mailto:Fogarty.Johnpc@epa.gov>]
Sent: Thursday, December 01, 2016 1:57 PM
To: Jennifer Hartman King <JHartmanKing@kingwilliamsllp.com>; John Hempfling (CE CEN) <John.Hempfling@wholefoods.com>; Welles, Laura <Welles.Laura@epa.gov>
Subject: RE: [CONFIDENTIAL SETTLEMENT COMMUNICATION] Checking in & proposed meeting dates (plus revised CAFO)

That'll be great - thanks. Laura and I can hold the afternoon (between noon and 5pm east coast time) of Thursday the 8th open, so any time within that block will work.

From: Jennifer Hartman King [<mailto:JHartmanKing@kingwilliamsllp.com>]
Sent: Thursday, December 01, 2016 4:36 PM
To: Fogarty, Johnpc <Fogarty.Johnpc@epa.gov>; John Hempfling (CE CEN) <John.Hempfling@wholefoods.com>; Welles, Laura <Welles.Laura@epa.gov>
Subject: RE: [CONFIDENTIAL SETTLEMENT COMMUNICATION] Checking in & proposed meeting dates (plus revised CAFO)

Great, thanks. I don't think it will be a problem for us to send feedback on the audit provisions in time for a call late next week.

Jennifer Hartman King, Managing Partner



520 Capitol Mall, Suite 750
Sacramento, CA 95814
916-379-7530 – Main phone
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From: Fogarty, Johnpc [<mailto:Fogarty.Johnpc@epa.gov>]

Sent: Thursday, December 01, 2016 1:26 PM

To: John Hempfling (CE CEN) <John.Hempfling@wholefoods.com>; Jennifer Hartman King <JHartmanKing@kingwilliamslaw.com>; Welles, Laura <Welles.Laura@epa.gov>

Subject: RE: [CONFIDENTIAL SETTLEMENT COMMUNICATION] Checking in & proposed meeting dates (plus revised CAFO)

Thanks for sending the CAFO this week, and look forward to getting the appendix as well - much appreciated. I will also get us a room in our building for the 21st.

With regard to getting together next week, and in light of John's schedule, we'll look into what works on Thursday or Friday. Do you think you will have comments/reaction to the audit by then? If not, one option might be to schedule for the following Monday or Tuesday so we can cover both the CAFO revisions and the audit.

Thanks!

From: John Hempfling (CE CEN) [<mailto:John.Hempfling@wholefoods.com>]

Sent: Thursday, December 01, 2016 3:21 PM

To: Jennifer Hartman King <jhartmanking@kingwilliamslaw.com>; Fogarty, Johnpc <Fogarty.Johnpc@epa.gov>; Welles, Laura <Welles.Laura@epa.gov>

Subject: RE: [CONFIDENTIAL SETTLEMENT COMMUNICATION] Checking in & proposed meeting dates (plus revised CAFO)

Hi All:

Just as an FYI for scheduling purposes: I'm in the air on Monday (12/5) and depo prep with witnesses on Tuesday (12/6) and Wednesday (12/7). I can do any time y'all want on 12/8 and 12/9, but if you would prefer to do earlier in the week let me know and I'll make it work (other than Monday, because I can't guarantee the airline will have me in any particular place at any particular time).

Thanks,

John

John H. Hempfling II
Sr. Global Litigation Counsel
Whole Foods Market Central Office
550 Bowie Street
Austin, Texas 78703
(512) 542-0213 (Office)
(512) 482-7213 (Fax)

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From: Jennifer Hartman King [<mailto:JHartmanKing@kingwilliamsllaw.com>]
Sent: Thursday, December 01, 2016 1:00 PM
To: Fogarty, Johnpc <Fogarty.Johnpc@epa.gov>; Welles, Laura <Welles.Laura@epa.gov>
Cc: John Hempfling (CE CEN) <John.Hempfling@wholefoods.com>
Subject: RE: [CONFIDENTIAL SETTLEMENT COMMUNICATION] Checking in & proposed meeting dates (plus revised CAFO)

Hi, John and Laura.

Thank you very much for your flexibility in scheduling our meeting during the week of the 19th. It would work best for us to meet with you on the 21st. How about starting at 9:00 a.m. at your offices?

I have attached the latest version of the draft CAFO, including a clean copy in Word format and a pdf showing the revisions we made. We tried to make as few changes as possible, though we did remove some provisions that we believe are not required by statute. We would be happy to schedule a call next week, as suggested in John's email below, to narrow down the issues for further discussion. If you would please let us know your availability, we can try to find a time that works for everyone. Thank you.

We are working on prepare a draft of Appendix A now, and will get it to you as quickly as possible. We are also reviewing the proposed third party audit provisions, and will follow up with you on that as soon as we can.

Thank you very much and we look forward to speaking with you soon.

Our best,
Jennifer and John

Jennifer Hartman King, Managing Partner



520 Capitol Mall, Suite 750
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From: Fogarty, Johnpc [<mailto:Fogarty.Johnpc@epa.gov>]
Sent: Wednesday, November 30, 2016 8:14 AM
To: Jennifer Hartman King <JHartmanKing@kingwilliamsllaw.com>; John.Hempfling@wholefoods.com
Cc: Welles, Laura <Welles.Laura@epa.gov>
Subject: RE: [CONFIDENTIAL SETTLEMENT COMMUNICATION] Checking in & proposed meeting dates

Hi Jennifer & John - hope your Thanksgiving was nice as well. Given all the leftovers we have, there's still tryptophan issues at my house...

We should absolutely plan on getting together the week of the 19th. Laura and I should be able to work our schedules to accommodate what works for you all, so pretty much any time between Monday the 19th and Thursday the 22nd will work. Let me know if you want to meet in our building, and I will see about securing a conference room. We can also meet elsewhere, if you'd prefer.

A couple other things, to help keep things moving at a good pace:

- It would be great if we could get together by phone sometime before the week of the 19th. If you're able to get us the draft CAFO by early next week (or even better, by the end of this week), we could talk late next week or early the week of the 12th. That way we could hopefully narrow down the remaining items to work through for when we get together face-to-face.

- Also, when you send us comments on the CAFO, can you please also make sure to include Appendix A? That will be very helpful for us.

Thanks! Talk to you soon.

From: Jennifer Hartman King [<mailto:JHartmanKing@kingwilliamsllp.com>]
Sent: Tuesday, November 29, 2016 2:18 PM
To: Fogarty, Johnpc <Fogarty.Johnpc@epa.gov>; Welles, Laura <Welles.Laura@epa.gov>
Cc: John.Hempfling@wholefoods.com
Subject: [CONFIDENTIAL SETTLEMENT COMMUNICATION] Checking in & proposed meeting dates

Hi, John and Laura.

John and I are working through the latest version of the draft CAFO, in addition to the proposed third party audit provisions, as quickly as possible. We anticipate having them back to you no later than early next week.

During our last call, we discussed scheduling an in-person meeting to work through the final agreements. We could meet you in DC during the week of December 19th. Please let us know if there is a date and time that week that works for you.

Thank you, and we hope you and your families had a wonderful Thanksgiving holiday.

Our best,
Jennifer and John

Jennifer Hartman King, Managing Partner



520 Capitol Mall, Suite 750
Sacramento, CA 95814
916-379-7530 – Main phone
916-379-7533 – Direct dial
916-379-7535 – Fax
Email: JHartmanKing@KingWilliamsLaw.com

Website: www.KingWilliamsLaw.com
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Message

From: Fogarty, Johnpc [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=8546B387C687410D88EEEE387DADDF56-JFOGAR02]
Sent: 12/2/2016 10:13:59 PM
To: Welles, Laura [Welles.Laura@epa.gov]
Subject: RE: Beth - can you give this a quick once-over, please?

Hey, I'm irish. My mouth has often gotten me in trouble. Enjoy your weekend!

-----Original Message-----

From: Welles, Laura
Sent: Friday, December 02, 2016 5:12 PM
To: Fogarty, Johnpc <Fogarty.Johnpc@epa.gov>
Subject: RE: Beth - can you give this a quick once-over, please?

That's a good response.

-----Original Message-----

From: Fogarty, Johnpc
Sent: Friday, December 02, 2016 4:25 PM
To: Welles, Laura <Welles.Laura@epa.gov>
Subject: RE: Beth - can you give this a quick once-over, please?

Ok, thanks. And if it were me, I might have said something smart-ass like "gee, you must be really really old, then."

-----Original Message-----

From: Welles, Laura
Sent: Friday, December 02, 2016 4:05 PM
To: Fogarty, Johnpc <Fogarty.Johnpc@epa.gov>
Subject: RE: Beth - can you give this a quick once-over, please?

The SEPs look good. I just had a couple of minor suggested edits/comments.

I'll get the WF list of follow up questions to you next.

It's funny -- this is random, but your wanting to be a lawyer comment about the 20 plus year policy document reminded me of something opposing counsel said to me in one of my first cases at Maine DEP. When I met the attorney at the courthouse for the initial hearing (we hadn't met yet), the first thing he said to me (as we were shaking hands) was "I've been practicing law longer than you've been alive." I remember saying something like -- that's nice or great -- good for you...

-----Original Message-----

From: Fogarty, Johnpc
Sent: Friday, December 02, 2016 2:40 PM
To: Welles, Laura <Welles.Laura@epa.gov>
Subject: RE: Beth - can you give this a quick once-over, please?

Ex. 5 AC/AWP/DP

Here's the cleanout SEP draft. Looks a lot like the lighting replacement SEP, except for the details (not running this one by Beth - any comments on the light SEP would apply to this one).

-----Original Message-----

From: Welles, Laura
Sent: Friday, December 02, 2016 2:34 PM
To: Fogarty, Johnpc <Fogarty.Johnpc@epa.gov>
Subject: RE: Beth - can you give this a quick once-over, please?

Great - thanks.

Ex. 5 AC/AWP/DP

Other edits:

- rewording re: September 2016 WF approached EPA, -the stipulated penalties section was taken out, - dispute resolution abbreviated, -new paragraph at end re: contingencies if consent agreement voided in whole or in part or EAB rejects the agreement, etc.
- force majeure removed

-----Original Message-----

From: Fogarty, Johnpc
Sent: Friday, December 02, 2016 1:06 PM
To: Welles, Laura <Welles.Laura@epa.gov>
Subject: RE: Beth - can you give this a quick once-over, please?

Please tell me it's not horrible edits.

Also, here is the SEP that now includes the selection criteria from the Houston settlement discussions added to it (won't change what Beth is looking at).

-----Original Message-----

From: Welles, Laura
Sent: Friday, December 02, 2016 12:30 PM
To: Fogarty, Johnpc <Fogarty.Johnpc@epa.gov>
Subject: RE: Beth - can you give this a quick once-over, please?

Yep - got it re: stips provision.

I'm just starting to look at the revised CAFO WF sent yesterday.

-----Original Message-----

From: Fogarty, Johnpc
Sent: Friday, December 02, 2016 10:42 AM
To: Cavalier, Beth <Cavalier.Beth@epa.gov>
Cc: Welles, Laura <Welles.Laura@epa.gov>
Subject: Beth - can you give this a quick once-over, please?

This is a first cut at a draft for the light ballast replacement SEP that we want to put on the table for the wholefoods case. Can you please give it a quick review and let me know if I've missed or bollixed anything up? Any other drafting thoughts on it would also be welcome - thx!

Laura, we'll need to make sure the stips provision in the body of the CAFO covers SEPs as well.

Message

From: Fogarty, Johnpc [Fogarty.Johnpc@epa.gov]
Sent: 1/3/2017 2:44:41 PM
To: Welles, Laura [Welles.Laura@epa.gov]
Subject: Re: Welcome back from Ex. 6 Personal Privacy (PP)

Yes - we should be able to do that.

Sent from my iPhone

> On Jan 3, 2017, at 9:43 AM, Welles, Laura <Welles.Laura@epa.gov> wrote:

>
> I'm about to send the email to WF, but before I commit us to review time I thought I should check with you. I think once we get the revised draft from them, we can turn the document around in less than a day. Are you good with that?

>
> -----Original Message-----
> From: Fogarty, Johnpc
> Sent: Tuesday, January 03, 2017 9:26 AM
> To: Welles, Laura <Welles.Laura@epa.gov>
> Subject: RE: Welcome back from Ex. 6 Personal Privacy (PP)

>
> I can help on the SEP section as well, but it would be good to have an example of what we've given the EAB before as a guide.

>
> -----Original Message-----
> From: Welles, Laura
> Sent: Tuesday, January 03, 2017 9:19 AM
> To: Fogarty, Johnpc <Fogarty.Johnpc@epa.gov>
> Subject: RE: Welcome back from Ex. 6 Personal Privacy (PP)

>
> I haven't received anything from WF. I'll send an email this morning and follow up with a call if need be.

>
> I'm working on the EAB memo using Walmart as the template -- one thing I may need some help with in the next day or so is the SEP portion. I plan to email Beth to see if she has an example of an EAB memo with a SEP.

Ex. 6 Personal Privacy (PP)

>
> I hope you had a good holiday!

>
> -----Original Message-----
> From: Fogarty, Johnpc
> Sent: Tuesday, January 03, 2017 9:08 AM
> To: Welles, Laura <Welles.Laura@epa.gov>
> Subject: Welcome back from Ex. 6 Personal Privacy (PP)

>
> I haven't seen anything from our friends at WF - maybe you got something? If not, can you please reach out to them this AM to see where they are on getting a draft back to us (I am assuming that they have the pen, not us). If you haven't heard from them by, say, 3 or 4 this afternoon, perhaps give Jennifer a call? If we're going to get this into the signature chain this week, we'll obviously need to hustle.
THANKS!

Message

From: Fogarty, Johnpc [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=8546B387C687410D88EEEE387DADDF56-JFOGAR02]
Sent: 12/2/2016 6:05:37 PM
To: Welles, Laura [Welles.Laura@epa.gov]
Subject: RE: Beth - can you give this a quick once-over, please?
Attachments: Light Ballast SEP - Whole Foods.12.2.16.docx

Please tell me it's not horrible edits.

Also, here is the SEP that now includes the selection criteria from the Houston settlement discussions added to it (won't change what Beth is looking at).

-----Original Message-----

From: Welles, Laura
Sent: Friday, December 02, 2016 12:30 PM
To: Fogarty, Johnpc <Fogarty.Johnpc@epa.gov>
Subject: RE: Beth - can you give this a quick once-over, please?

Yep - got it re: stips provision.

I'm just starting to look at the revised CAFO WF sent yesterday.

-----Original Message-----

From: Fogarty, Johnpc
Sent: Friday, December 02, 2016 10:42 AM
To: Cavalier, Beth <Cavalier.Beth@epa.gov>
Cc: Welles, Laura <Welles.Laura@epa.gov>
Subject: Beth - can you give this a quick once-over, please?

This is a first cut at a draft for the light ballast replacement SEP that we want to put on the table for the wholefoods case. Can you please give it a quick review and let me know if I've missed or bollixed anything up? Any other drafting thoughts on it would also be welcome - thx!

Laura, we'll need to make sure the stips provision in the body of the CAFO covers SEPs as well.

Message

From: Fogarty, Johnpc [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=8546B387C687410D88EEEE387DADDF56-JFOGAR02]
Sent: 12/2/2016 1:41:16 PM
To: Holmes, Carol [Holmes.Carol@epa.gov]
Subject: RE: This morning

It's a company-wide RCRA case we're negotiating. Trying to wrap things up this month - or at least as much as possible, god willing and the creek don't rise.

-----Original Message-----

From: Holmes, Carol
Sent: Friday, December 02, 2016 8:37 AM
To: Fogarty, Johnpc <Fogarty.Johnpc@epa.gov>
Subject: Re: This morning

On metro platform.

What are you doing on Whole Foods?

> May contain sensitive communication for internal deliberations only, attorney-client communication, attorney work product, and/or enforcement sensitive information. Do not distribute outside the U.S. Government.

>
> _____
> Carol S. Holmes
> Senior Counsel
> Cross Cutting Policy Staff
> Office of Civil Enforcement (MC 2241A) U.S. Environmental Protection
> Agency
> 1200 Pennsylvania Ave, NW
> Washington, DC 20460
> Phone (202) 564-8709
> _____

> On Dec 2, 2016, at 8:36 AM, Fogarty, Johnpc <Fogarty.Johnpc@epa.gov> wrote:

>

> Not sure if you are coming in or working from home today - I think it's your compressed day - but I have blocked off this morning to work on the wholefoods case. But, let me know if there's something you need me to do to help on delegations stuff - I should be able to carve out some time on that.

Message

From: Fogarty, Johnpc [Fogarty.Johnpc@epa.gov]
Sent: 12/22/2016 9:33:33 PM
To: Welles, Laura [Welles.Laura@epa.gov]
Subject: Re: Revised SEP appendix

You're at the end of a long line of folks who have battled all the damn systems.....

Ex. 6 Personal Privacy (PP)

Sent from my iPhone

On Dec 22, 2016, at 3:11 PM, Welles, Laura <Welles.Laura@epa.gov> wrote:

Well – that's good. Enjoy the debauchery!

I have to say I've never worked at a place with more forms or databases... I've screwed things up in PP, EE, etc.

From: Fogarty, Johnpc
Sent: Thursday, December 22, 2016 2:28 PM
To: Welles, Laura <Welles.Laura@epa.gov>
Subject: RE: Revised SEP appendix

Yes I am still here. Doing other crapola. But am going to the gym shortly to get one last workout in, before the holiday debauchery starts!

From: Welles, Laura
Sent: Thursday, December 22, 2016 2:27 PM
To: Fogarty, Johnpc <Fogarty.Johnpc@epa.gov>
Subject: RE: Revised SEP appendix

I hope you're still not in the office. It's too nice outside!

From: Fogarty, Johnpc
Sent: Thursday, December 22, 2016 1:19 PM
To: Jennifer Hartman King <JHartmanKing@kingwilliamsllaw.com>; John Hempfling (CE CEN) <John.Hempfling@wholefoods.com>
Cc: Welles, Laura <Welles.Laura@epa.gov>
Subject: Revised SEP appendix

Hi folks – thanks again for coming in yesterday to work things through to final. It's a good outcome all around, and appreciate the collaboration to get there.

Attached is a revised draft of the SEP appendix based on yesterday's discussion, which now blends both light change-outs and training. It's in redline from the prior version we'd sent earlier, so that it's easier to see how it's been modified to (hopefully!) reflect what we talked about.

A few things to highlight in particular:

- <!--[if !supportLists]--><!--[endif]-->We've left the deadline for completing the SEP blank (in Para 7), but as discussed yesterday we have flexibility for spreading out the costs over

time. Laura and I were thinking 3 years, but will defer to you on that. Note that there is an express provision in that paragraph allowing us to extend the term.

- <!--[if !supportLists]--><!--[endif]-->The earlier version of the SEP had specified a census data-based method to identify low/moderate income areas (in Para 3.i) in which to perform the SEP. Since WF already has been doing some work in low income areas, we made the reference to the census data optional only (but we'd like to retain it as it's helpful for us in other contexts as an objective standard, and also indicates a general intent), but as revised you are able to use your own methodology – just let us know how communities were identified in the SEP completion report (Para 8.b).
- <!--[if !supportLists]--><!--[endif]-->While we talked yesterday in terms of light change-outs at schools, this draft (like the original one) also allows for the work to happen at youth community centers in order to increase the potential choices, just in case you need the flexibility.
- <!--[if !supportLists]--><!--[endif]-->You probably are already aware of this, but Paragraphs 9-14 are pretty much boilerplate from the SEP policy (<https://www.epa.gov/sites/production/files/2015-04/documents/sepupdatedpolicy15.pdf>)

Thanks again – give us a holler if you have any questions on the SEP or on the CAFO/appendices when you have those ready to share.

Ex. 6 Personal Privacy (PP)

but I am nonetheless working periodically on a few things so we can get back to you before the new year – and with any luck we'll be circulating signature pages that first week.

Happy holidays!

**BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.**

IN THE MATTER OF:	)	EPA Docket No.
	)	RCRA-HQ-2017-0001
)	
)	
Whole Foods Market Group, Inc.,	)	Proceeding Under Section 3008(a) of the
Whole Foods Market California, Inc.,	)	Resource Conservation and Recovery Act,
Mrs. Gooch's Natural Food Markets, Inc.,	)	42 U.S.C. § 6928(a)
Whole Foods Market Pacific Northwest, Inc.,)	
Whole Foods Market Rocky Mountain/ Southwest, L.P.,)	
WFM Northern Nevada, Inc.,)	
WFM Southern Nevada, Inc.,)	
WFM Hawaii, LLC,)	
WFM Kansas, LLC,)	
WFM-WO, Inc.,)	
Nature's Heartland, Inc.,)	
WFM Nebraska, LLC, and)	
Whole Foods Market Lusher Court Frisco CO, LLC)	
)	
RESPONDENTS.)	

CONSENT AGREEMENT AND FINAL ORDER

APPENDIX A

BUSINESS CONFIDENTIALITY ASSERTED IN ACCORDANCE WITH 40 C.F.R. § 22.5(d)

CONSENT AGREEMENT AND FINAL ORDER

APPENDIX A

IN ACCORDANCE WITH 40 C.F.R. § 22.5(d), INFORMATION CLAIMED CONFIDENTIAL HAS BEEN DELETED.

A COMPLETE COPY OF THE DOCUMENT CONTAINING THE INFORMATION CLAIMED CONFIDENTIAL HAS BEEN FILED WITH THE REGIONAL HEARING CLERK.

Message

From: Fogarty, Johnpc [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=8546B387C687410D88EEEE387DADDF56-JFOGAR02]
Sent: 12/20/2016 4:00:35 PM
To: Welles, Laura [Welles.Laura@epa.gov]
Subject: Re: EPA/Whole Foods Market -- EPA 12-13-16 revisions to Draft CAFO

Also, are you on the line? I hear music only.

From: Welles, Laura
Sent: Tuesday, December 20, 2016 10:58 AM
To: Fogarty, Johnpc
Subject: RE: EPA/Whole Foods Market -- EPA 12-13-16 revisions to Draft CAFO

Just as an FYI – with regard to paragraph 42 (remember Suzuki and part 22.18(c)), WFM's region 5 CAFO re: EPCRA (violations at distribution center) had almost exactly the same language.

From: Welles, Laura
Sent: Tuesday, December 20, 2016 10:55 AM
To: Fogarty, Johnpc <Fogarty.Johnpc@epa.gov>
Subject: FW: EPA/Whole Foods Market -- EPA 12-13-16 revisions to Draft CAFO

Here's the latest draft CAFO.

From: Welles, Laura
Sent: Tuesday, December 13, 2016 5:02 PM
To: John Hempfling (CE CEN) <John.Hempfling@wholefoods.com>; 'Jennifer Hartman King' <JHartmanKing@kingwilliamslaw.com>
Cc: Fogarty, Johnpc <Fogarty.Johnpc@epa.gov>
Subject: EPA/Whole Foods Market -- EPA 12-13-16 revisions to Draft CAFO

Hi John and Jenn,

It was good to touch base with you last week to hear your reasoning behind some of WFM's most recent revisions to the draft CAFO. It helped us to better understand where WFM is coming from re: wanting flexibility, time, and less contact with EPA. We heard your concerns and believe the attached draft CAFO with EPA's latest revisions strikes a good balance between the needs of EPA and WFM. As you will find, we accepted most of your proposed 12-1-16 revisions. We've included a detailed description of the more substantive changes, including our rationale. If time allows, we would also like to go over these proposed revisions during our call on Thursday – but if not, it would still be a good idea to discuss them before you all turn back a new draft.

EPA's proposed changes:

- Paragraph 8, first sentence – Per WFM's recent edits, we removed the Statutory and Regulatory Background section. Our edit to this sentence aims to connect the statute with the implementing regulations.
- Paragraphs 18 and 19 were combined and reworded – We have gone back and forth on this language a little and the proposed changes seek neutral ground. From our perspective we are trying to reflect the fact that this is at base a voluntary disclosure (which is a key part of the foundation for penalty mitigation).

- Paragraphs 22 and 24 – We understand WFM’s reasoning for wanting language that indicates there was no additional investigation. We changed “without an independent investigation” to “without a nationwide investigation.” We thought it was a more appropriate description of the situation. This is somewhat connected to the point made in Paragraphs 18 and 19.

With regard to “any admission of liability or guilt by Respondents,” we removed the “or guilt” language as this is a civil matter not criminal.

- Paragraph 27, specifically 27(c) and (d) – As we have discussed, EPA hopes WFM’s enhanced hazardous waste program becomes a model for retail grocery stores. We understand that WFM wants both flexibility, as well as keeping many of the specifics confidential per 40 CFR Part 2. Our hope is that these proposed changes reflect what we discussed last week re: flexibility while at the same time providing the public with some overall concept of WFM’s enhanced hazardous waste program. We’re obviously open to different ways to phrase the use of scanners, etc. – in the draft the phrasing is similar to what we discussed on the last call.
- Paragraph 29 – As we explained last week, multi-year agreements typically have reporting on the progress of implementation ranging from quarterly to annually. As you will find, we put the reporting requirement back in, but want to stress to you that we have made it annual only (the least frequent), and the scope is narrow so that it is only associated with WFM’s enhanced hazardous waste management program. Additionally, the first deadline coincides with a reporting requirement under the R6 CAFOs.
- Paragraph 31 – We removed the language here and put the standard certification language. We removed the DD contact because we thought it was repetitive and that paragraph 49 covers notice, etc. (also helps keep the document shorter).
- Paragraphs 38 and 39 – Per our discussion last week, we put stipulated penalties back in the draft CAFO. As we explained last week, stipulated penalties are standard practice in EPA settlements. We reworded a bit by taking out the second sentence of the 11-10-2016 version.
- Paragraph 42 – We put the regulatory language of 22.18(c) here based on recent EAB memos, including the Suzuki memo. Since Suzuki, there have been two other EAB memos that discuss 22.18(c) and what the EAB expects to see in a CAFO. The second sentence was added—this is also from 22.18(c). As you will find, we accepted WFM’s removal of paragraph 53 of the 11-10-2016 version.
- Paragraph 45 – We moved WFM’s proposed Paragraph 49 of the 12-1-2016 version and put it here. As you will find, we deleted the first sentence—this is based on an EAB order in Berry Petroleum Company, et al. where the EAB stated “[i]n exercising its section 22.18(b)(3) authority, the Board has not unilaterally modified a consent agreement or ratified only portions thereof.” We think this still gets to the same place that you were trying to get to with the original language.
- Section VII (Dispute Resolution) – We want to flag this section for further discussion on Thursday. As you’ll find, we did not make any changes to WFM’s revisions, and we are generally amenable to the shorter approach. As drafted, however, there’s the potential for an endless “do loop” for informal discussions, so we’ll need to include something to cover where the parties are not able to resolve a dispute informally.

Please let us know if you have any questions regarding the attached CAFO. We look forward to discussing it more on Thursday.

Also – we are available at 4 pm eastern on Thursday (12/15) if that works better for you.

Thanks,
Laura

Laura Welles
Attorney Advisor
Waste and Chemical Enforcement Division
Office of Civil Enforcement
U.S. Environmental Protection Agency
(202) 564-2754

Message

From: Fogarty, Johnpc [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=8546B387C687410D88EEEE387DADDF56-JFOGAR02]
Sent: 12/19/2016 10:13:03 PM
To: Welles, Laura [Welles.Laura@epa.gov]
Subject: RE: Possible way to approach DR, etc.

Yeah, I think that's right.

From: Welles, Laura
Sent: Monday, December 19, 2016 4:35 PM
To: Fogarty, Johnpc <Fogarty.Johnpc@epa.gov>
Subject: RE: Possible way to approach DR, etc.

I'll ask him, but I'm getting the sense that it may not be a good idea to blaze a new trail...

From: Fogarty, Johnpc
Sent: Monday, December 19, 2016 4:25 PM
To: Welles, Laura <Welles.Laura@epa.gov>
Subject: RE: Possible way to approach DR, etc.

Ex. 5 AC/AWP/DP

From: Welles, Laura
Sent: Monday, December 19, 2016 4:21 PM
To: Fogarty, Johnpc <Fogarty.Johnpc@epa.gov>
Subject: Possible way to approach DR, etc.

I'm thinking out loud here & before I draft language (or look into this a bit more) I want to run it by you to hear your thoughts AND to see if it's even plausible, etc.

Ex. 5 AC/AWP/DP

Ex. 5 AC/AWP/DP

Ex. 5 AC/AWP/DP

Ex. 5 AC/AWP/DP

Ex. 5 AC/AWP/DP

Thoughts? Does the above make sense?